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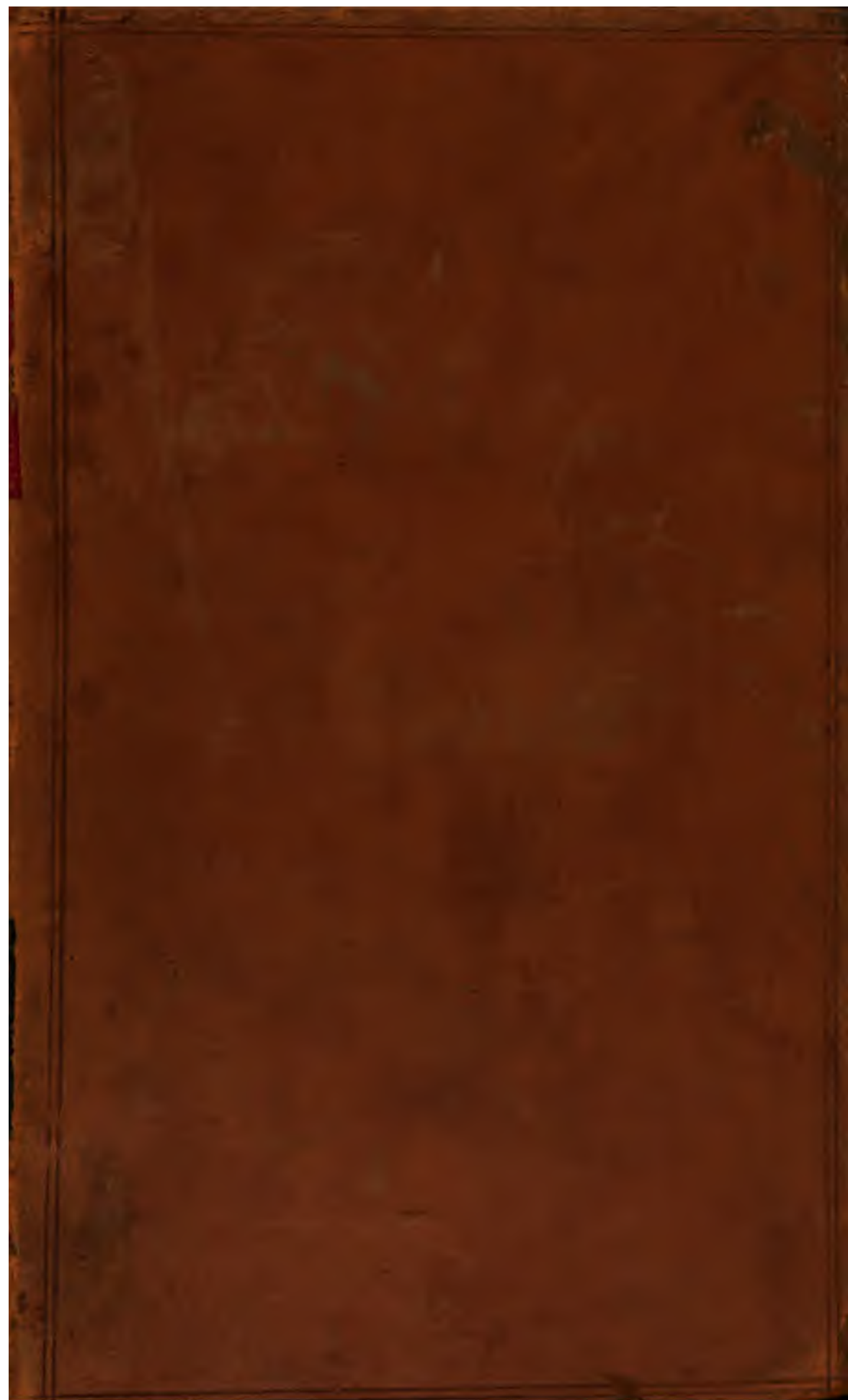
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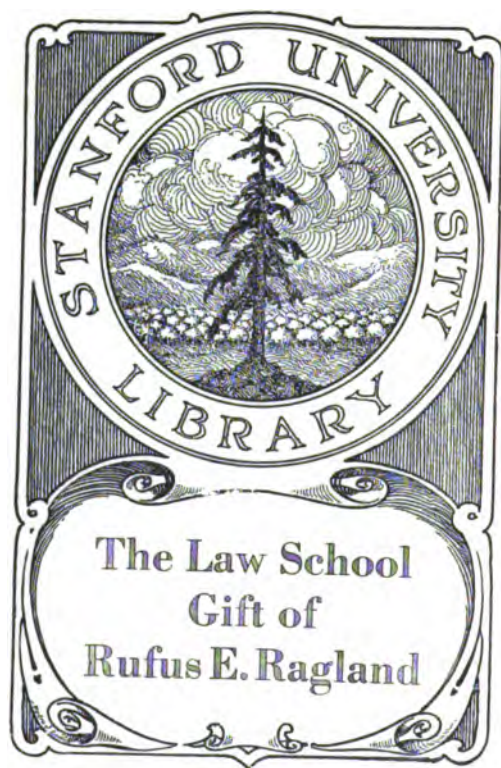
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James P. Fordwell

James O. Smith



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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
ENGLISH COURT
OF
CHANCERY,
WITH NOTES AND REFERENCES
TO BOTH ENGLISH AND AMERICAN DECISIONS.

BY E. FITCH SMITH,
COUNSELLOR AT LAW.

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1850.

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ARGUED AND DETERMINED
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HIGH COURT OF CHANCERY,
DURING THE TIME OF
LORD CHANCELLOR COTTENHAM.

By T. J. PHILLIPS, Esq.,
BARRISTER AT LAW.

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Lord Chancellor,
LORD COTTENHAM.

Master of the Rolls,
LORD LANGDALE.

Vice-Chancellors,
SIR LANCELOT SHADWELL,
SIR JAMES L. KNIGHT BRUCE,
SIR JAMES WIGRAM.

Attorney-General,
SIR JOHN JERVIS.

Solicitors-General,
SIR DAVID DUNDAS,
SIR JOHN ROMILLY.

OT

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ORDER OF COURT.

Wednesday, 23rd July, 1847.

16 & 11 Vict. c. 97, s. 6.

Attendance of Masters in Public Office to cease.

All references to be made by the junior Master for the time being.

According to regular rotation.

The rota to be kept secret.

Record of references to be kept by chief clerk.

In the vacations, the duty to be performed by the vacation Master and his chief clerk.

Whereas, in pursuance of an act passed in the present session of parliament, the attendance of the Masters in Ordinary of this Court in the Public Office will be discontinued from and after the 10th day of August now next ensuing; and there will thenceforth be no Master sitting in the said Public Office by whom references may be made as heretofore to the Masters in Ordinary, nor will there be any person to register references or to do what has heretofore been done in that behalf by the clerk in the Public Office: HIS LORDSHIP DOTH ORDER, that, from and after the said 10th day of August, all references shall be made by the junior Master for the time being, and during his occasional or necessary absence, then by such other Master as the Masters among themselves may agree upon for that purpose. And that the referring Master shall be responsible that all references shall be made according to regular and just rotation, and in such manner as to keep secret from all persons whatsoever the rota or succession of Masters to whom causes and matters shall be referred. And for this purpose the name of the Master to whom any new reference is made shall be inserted in the order by the referring Master himself, and by no other person whatsoever; and that it shall be the duty of the chief clerk of the said referring Master, or of the Master for the time being performing that duty, to keep the record of references with proper indexes, and to enter therein all references in the manner heretofore done by the clerk of the Public Office, and that the duty of making the references as aforesaid shall, during vacation, be performed by the vacation Master and his chief Clerk. AND HIS LORDSHIP DOTH ORDER, that the before-mentioned duties shall be subject to such regulations and modifications in the execution thereof as the Masters themselves may from time to time direct.

COTTENHAM, C.

ORDERS IN CHANCERY.

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ORDER OF COURT.

9th August, 1847.

10 and 11 Vict. c. 97.

In pursuance of the 10 & 11 VICT. c. 97., "An Act for the discontinuance of the Masters in Ordinary of the High Court of Chancery in the Public Office, and for transferring the Business of such Public Office to the Affidavit Office in Chancery."

I.

Affidavits to be sworn before one of the clerks of affidavits.

That on and after the 10th day of August 1847, all affidavits and affirmations shall be sworn or affirmed before Samuel Anderson, the clerk of affidavits, John Jefferson, and William Thodey Smith, the assistant clerks of affidavits, or any one of them, who are to receive the proper and usual fees for taking the same, and to pay the amount of the several sums which they may so receive into the Bank of England to the account of the suitors' fund.

II.

Local situation of their office, from 10th August to 15th October, 1847.

That on and after the 10th day of August 1847, and until the 15th of October 1847, all the duties heretofore performed by the Masters in Ordinary in the Public Office pursuant to the act passed in the thirteenth year of his late Majesty King Charles the Second, as well as the duties heretofore performed at the Affidavit Office, shall be performed by the said clerk of affidavits and assistant clerks of affidavits at the Chancery Affidavit Office, Symond's Inn, and at such other places as the due despatch of business may require.

III.

After the 15th of October, 1847.

That on and after the 15th day of October, 1847, the said clerk of affidavits and assistant clerks of affidavits shall perform the same duties at the offices in Southampton Buildings, now used as the Public Office and by Master Richards as his chambers, and at such other place as the dispatch of business may require.

COTTENHAM, C.

ORDER OF COURT.

Saturday, 10th June, 1848.

10 & 11 Vict., c. 96.

The Right Honorable CHARLES CHRISTOPHER, LORD COTTENHAM, Lord High Chancellor of Great Britain, with the assistance of The Right Honorable HENRY LORD LANGDALE, Master of the Rolls, doth hereby, in pursuance of an Act of Parliament passed in the tenth and eleventh year of the reign of Her present Majesty, intituled "An Act for the better securing Trust Funds, and for the Relief of Trustees," and in pursuance and execution of all other powers enabling him in that behalf, order and direct in manner following, that is to say:—

I.

Form of affidavit to be made by trustees previous to payment of money or transfer of stock into Court under the act.

Any trustee desiring to pay money or transfer stock or securities into the name of the Accountant-General of the Court of Chancery, under the said act, is to file an affidavit, entitled in the matter of the act and of the trust, and setting forth,

1. His own name and address.
2. The place where he is to be served with any petition or any notice of any proceeding or order of the Court relating to the Trust Fund.
3. The amount of stock, securities, or money which he proposes to deposit, or to transfer, or to pay into Court to the credit of the trust.
4. A short description of the trust and of the instrument creating it.
5. The names of the parties interested in or entitled to the fund, to the best of the knowledge and belief of the trustee.
6. The submission of the trustee to answer all such inquiries relating to the application of the stocks, securities, or money transferred, deposited, or paid in under the act as the Court may think proper to make or direct.

II.

Pursuant to which, Accountant-General is to direct payment or transfer, &c., and to certify the same.

The Accountant-General, on production of an office copy of the affi-

davit, is to give the necessary directions for transfer, deposit, or payment, and to place the stock, securities or money to the account of the particular trust, and such transfer, deposit, or payment is to be certified in the usual manner.

III.

After which, notice to be given by trustee to parties interested.

The trustee having made the payment, transfer, or deposit, is forthwith to give notice thereof to the several persons named in his affidavit, as interested in or entitled to the fund.

IV.

Who may apply by petition.

Such persons, or any of them, or the trustee, may apply by petition, as occasion may require, respecting the investment, payment out, or distribution of the fund, or of the dividends or interest thereof.

V.

On notice to trustee.

The trustee is to be served with notice of any application made to the Court respecting the fund, or the dividends or interest thereof, by any party interested therein or entitled thereto.

VI.

Or trustees may apply on notice to parties interested.

The parties interested in or entitled to the fund are to be served with notice of any application made to the Court by the trustee, respecting the fund in Court, or the interest or dividends thereof.

VII.

Every petitioner to name a place where he may be served.

No petition is to be set down to be heard, until the petitioner has first named a place, where he may be served with any petition or notice of any proceeding or order of the Court relating to the Trust Fund.

VIII.

Title of petitions, &c., under the act.

Petitions presented, and affidavits filed under the said act, are to be entitled in the matter of the said act, (10 & 11 Vict. c. 96,) and in the matter of the particular trust.

ORDERS IN CHANCERY.

That this order be entered with the Registrar of the High Court of Chancery.

COTTENHAM, C.
LANGDALE, M. R.

29th December, 1848

10 & 11 Vict., c. 94.

The Right Honorable CHARLES CHRISTOPHER LORD COTTENHAM, Lord High Chancellor of Great Britain, with the advice and assistance of HENRY LORD LANGDALE, Master of the Rolls, doth hereby in pursuance of an Act of Parliament made and passed in the Session of Parliament held in the 11th and 12th years of the reign of Her present Majesty, intituled "An act to regulate certain Offices in the Petty Bag in the High Court of Chancery, the Practice of the Common Law side of that Court, and the Enrolment Office of the said Court," and in pursuance of all other powers enabling him in this behalf, order and direct that all and every the Rules, Orders, and directions hereinafter set forth shall henceforth be, and for all purposes be deemed and taken to be general Rules and Orders of the High Court of Chancery on the Common Law side thereof viz:—

INTRODUCTORY.

Existing rules and orders not inconsistent with the following, to remain in force.

I. All former Rules and Orders regulating the practices and proceedings in the Petty Bag Office, so far as the same are now in force, and are consistent with the said Act of Parliament and with these Orders, are to remain in full force and effect.

Time when these Orders are to take effect.

II. These Orders as to all suits, matters, and proceedings now pending or hereafter to be commenced, are (so far as the same are applicable to the state of such matters and proceedings) to take effect on the first day of January, 1849.

Official Attendance and Vacations.

Rules as to official attendance and vacations, the same as in Record and Writ office

III. In the Office of the Petty Bag.

1. The Office is to be open and closed on the same days—and,

2. The Vacations are to be observed at the same times—and,
3. The Clerk is to attend in the Office during the same hours,

As are for the same purposes and in relation to the same matters appointed by the general Rules of the Court of Chancery in the Office of the Clerks of Records and Writs, subject nevertheless to such alterations as, for some special reasons, may be at any time made by the Lord Chancellor, with the advice and assistance of the Master of the Rolls.

Clerk of the Petty Bag.

Duties of Clerk.—Clerk to have custody of Common Law seal.

IV. The Clerk of the Petty Bag is to have the care and custody of the Chancery Common Law Seal, and is to use and employ the same for sealing such several writs, and all such documents and writings as are by the said act authorized to be sealed with the same Seal.

Swearing and filing of affidavits.

V. Affidavits, Affirmations and Declarations to be used in any proceeding on the Common Law side of the Court are to be sworn, affirmed, or declared before the Clerk of the Petty Bag, or before a Master Extraordinary of the High Court of Chancery, and are to be filed in the Office of the Petty Bag.

Date or tests of writs, &c., issued.

VI. Every Writ, Rule, or Document issued or delivered out of the Petty Bag Office is to be tested or dated on the day on which the Writ is sealed, or the Rule or other document is made.

Filing of writ when returned.

VII. Every Writ returned by the Sheriff is to be immediately filed and thereupon the day and hour of the filing are to be endorsed on the Writ.

Transcripts of verdicts or judgments on issues, when returned, to be filed, entered and annexed to original record, and thereupon judgment of this Court to be entered accordingly.

VIII. The Clerk of the Petty Bag, upon receiving the return of the transcript of the Verdict of the Jury, and proceedings of Judgment of any Court of Common Law upon any Issue in Law, or in fact, is to file the same in the Petty Bag Office, and is to cause an entry to be made of such Verdict and proceedings or Judgment, and such transcript is to be annexed to the Original Record in the Petty Bag Office, and thereupon the Judgment of the Court of Chancery is to be entered on, or

ORDERS IN CHANCERY.

annexed to, the same Record, in conformity with the Judgment of the Court from which the transcript is returned.

Attorney.

Solicitors of High Court of Chancery may act as attorneys in this Court.

IX. Every Solicitor, whose name is duly enrolled as such in the High Court of Chancery, may act as an Attorney in any Action, Suit, Matter, or Proceeding pending on the Common Law side of the same Court, and is to be therein named and treated as the Attorney of the party by whom he is retained.

Change of attorney to be notified to the entry thereof made with the clerk.

X. Any party changing or ceasing to employ his Attorney in the course of any Action, Suit, or Proceeding is to cause an entry of such change or cessation of employment to be made and entered with the Clerk of the Petty Bag, and to cause notice of such change or cessation of employment and of such entry to be served on every party to the Action, Suit, or Proceeding, and until such entry and notice shall have been made and served, the former Attorney is to be deemed and taken for all purposes of the Action, Suit, or proceeding, to be and remain the Attorney of the Party.

Scire Facias.

Form of inserting name and addition of prosecutor in the writ.

XI. The name and addition of the Prosecutor in an Action of *Scire facias* may be inserted in the Writ, by adding after the usual words, "We are given to understand and be informed" words in the form following—viz: "by A. B., of, &c.," stating at length the name, addition, and place of residence of the Prosecutor.

Name and address of prosecutor to be inserted in writ before the fiat of Attorney General be filed.

XII. If the name of a Prosecutor be inserted in a Writ of *Scire facias*, the fiat of the Attorney General for the issuing of such Writ is not to be filed, unless the same contains the name and address of such Prosecutor.

Prosecutor to have his choice of the Superior Courts.

XIII. The proceedings and trial in an Action of *Scire facias* may take place and be had in such one of Her Majesty's Superior Courts of

ORDERS IN CHANCERY.

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Common Law, as may be chosen by the party applying to have the Writ sealed.

Preliminaries to sealing scire facias to revoke patent. Fiat to be filed. Name of Court to be endorsed. Copy of writ to be filed.

XIV. A writ of Scire facias to revoke Letters Patent is not to be sealed; 1, until the Fiat of the Attorney General is filed in the Petty Bag Office; 2, until the name of some one of Her Majesty's Superior Courts of Common Law is indorsed or written thereon; 3, until a true copy of the Writ and of any Drawings or Plans annexed thereto (to be verified by affidavit) has been filed in the Petty Bag Office.

As to writs sealed before 1st of January, 1849.

XV. If such Writ has been sealed before the 1st day of January, 1849, and the Record of the Action has not been carried or transmitted into the Court of Queen's Bench, the name of some one of Her Majesty's Superior Courts of Common Law is to be indorsed on the Writ, and a Memorandum thereof entered with the Clerk of the Petty Bag Office before any subsequent proceeding is taken in the action.

Trial and other proceedings in the action to take place in the Court endorsed.

XVI. The Trial and any proceedings in an Action of Scire facias are to take place in the Court of Common Law, the name of which is indorsed or written on the Writ.

Bond of indemnity for costs to be given, at request of Attorney General, by such persons and in such sum as he shall name.

XVII. A Bond of Indemnity against Costs, to be incurred in the prosecution of an Action of Scire facias, may (if so desired by the Attorney-General) be taken in the name of the Clerk of the Petty Bag, but the same is not to be deposited or filed in the Office of the Petty Bag unless the intended Obligors, and the sums for which they are to give security, be named by the Attorney-General.

How such bond is to be put in suit.

XVIII. A Bond of Indemnity filed or deposited in the Petty Bag Office may, at the request of the Attorney-General, be put in suit under such circumstances, and upon such terms and conditions as the Lord Chancellor or the Master of the Rolls may approve of.

Appearances to be entered within eight days after return and filing of writs.

XIX. An Appearance is to be entered by or on behalf of any Defen-

ORDERS IN CHANCERY.

dant who has been summoned by the Sheriff within eight days after the Writ of Scire facias has been returned and filed.

FEES.

Fees according to Schedule to be received and applied as in Record and Writ Office.

The Clerk of the Petty Bag is, until further Order, to receive and take the several fees which are set forth in the Schedule hereunder written, and is to account for the same, and pay the amount thereof into the Suitors' Fee Fund, in the same manner, and at the same times as the Clerks of Records and Writs receive, account for, and pay the fees received by them in their office.

THE SCHEDULE ABOVE REFERRED TO.

Fees to be received by the Clerk of the Petty Bag.

	<i>£</i>	<i>s.</i>	<i>d.</i>
For filing every qualification of a Member of Parliament	0	2	0
On every Dedimus Protestatum issued from the Crown Office to swear a justice of the Peace	0	2	6
On filing every Affidavit of execution of Articles of Clerkship, entering Affidavit, and making the endorsements required by the act of 6th and 7th Vict. cap. 73.	0	5	0
For striking every Solicitor off the Roll, either at his own request or otherwise	0	7	6
For altering the name of every Solicitor on the Roll	0	7	6
For every Certificate of striking a Solicitor off the Roll, and for every other certificate not herein specifically mentioned	0	2	6
For enrolling every Surrender	1	10	0
For the admission of every Master in Chancery	1	12	6
For administering every Oath and qualification in Court (except on Admission of Solicitors)	2	2	0
For swearing any Officer of the Court whose admission is enrolled in the Petty Bag Office (except Solicitors) and enrolling the admission	5	0	0
For attending with Records or other documents in any Court or place (besides expenses to be retained by the Officer to his own use (per diem	2	2	0
For filing the returns to all Special Commissions, Articles of the Peace			

ORDERS IN CHANCERY.

xxi

	£	s.	d.
an a Supplicavit, and Commissions and Writs of every kind returned and filed in this Office	0	2	6
Drawing and signing the Certificate under the Officer's hand of any return being filed in this Office where no Office Copy is taken	0	2	6
For every Congé d'élire for an Archbishop	19	15	8
Ditto for a Bishop	9	17	10
For every Royal Assent for an Archbishop	19	15	8
Ditto for a Bishop	9	17	10
For every Patent of Assistance and Writs of Restitution for an Archbishop	30	17	8
Ditto for a Bishop	15	8	10
For every appointment of a Bishop for the Isle of Man	9	17	10
For preparing and issuing every Certiorari other than to remove causes from the inferior courts	3	0	0
For preparing every Mittimus and Transcript of Commission of Lunacy, Return and Inquisition thereon to the Lord Chancellor of Ireland	3	0	0
For preparing and issuing every Special Commission to seize Lands escheated to the Crown, or purchased by Aliens, or forfeited by Felons, of one skin only	6	0	0
For every additional skin	3	0	0
For the Writ of Summons to every Peer and Law Officer, and for Election of Members	0	7	2
For making out the commission for electing the Peers of Scotland	5	14	8
For drawing and ingrossing the Parliament Pawn	10	0	0
Ditto for Ireland	5	0	0
The Bags for the Writs	0	10	0
Fee from the Messenger to the Great Seal	5	5	0
For sealing every original Writ of Scire facias to revoke Letters Patent or Commission on Petition of Right	5	0	0
For sealing every Alias or Testotum Scire facias	2	10	0
For sealing every Scire facias on Recognizance or Traverse	1	0	0
For examining and filing every Bond of Indemnity against costs and Affidavits	1	0	0
For filing a Traverse to an Inquisition	2	0	0
Entering appearance for every Defendant	0	10	0
For entering every Rule requiring entry only	0	7	0
For drawing up and entering every other Rule	0	10	0
For drawing up and entering a Special Order	2	0	0
For signing every Judgment or entry of Nolle prosequi	1	0	0
For filing a Record of Issue on a Scire facias to revoke Letters Patent or Traverse, and selling the Transcript	5	0	0
Ditto on a Scire facias on Recognizance, or on a Bill against an Officer of the Court	2	0	0
For drawing and entering an Order to vacate Letters Patent	2	0	0
For filing Order for delivery out of Bond	0	10	0
For swearing every Deponent to an Affidavit	0	1	6
For every Exhibit thereto	0	2	0

	£	s.	d.
For taxing a Bill of Costs for every side	0	1	0
For filing every Affidavit	0	1	0
For Office copy of Affidavit, per folio	0	0	4
On filing every Bill against an Officer of the Court	0	10	0
For preparing, ingrossing, and perfecting the Exemplification of any Record, if one skin only	5	5	0
For every additional skin	1	6	8
For every Search for the precipe or Writ filed	0	1	0
For searching the Kalendar for every year	0	1	0
For inspection of any Record besides the search	6	2	6
For the Office copy of any Record, per folio	0	0	4
For Certificate of examination under the Officer's hand and the Office Seal	0	3	4
For the re-examination of the copy of any Record, if short	0	3	6
If long, per folio	0	0	1
For sealing every Writ of,			
Audita querela	0	15	0
Ad quod damnum	0	10	0
Accedas ad curiam	0	5	0
Attachment	0	5	0
Commission of Errors	0	15	0
Contumance capiendo	0	15	0
Coronatore eligend' or amovend'	0	10	0
Capias ad satisfaciendum	0	15	0
Certiorari (except to remove a conviction for felony)	0	15	0
Dower	0	5	0
Error	0	10	0
Ditto to Parliament	3	3	0
Excommunicato capiendo	0	15	0
Elegit	0	15	0
Executione Judicii	0	5	0
False Judgment	0	5	0
Fieri facias	0	15	0
Inquiry of damages	0	15	0
Justices	0	5	0
Levari facias	0	15	0
Mittimus upon Certiorari or significatione	0	15	0
Ne exeat regno	0	10	0
Ne admittas	0	5	0
Pone	0	5	0
Procedendo	0	5	0
Prohibition	0	10	0
Quare Impedit	0	10	0
Regardatore eligend' or amovend'	0	10	0
Recordari	0	5	0
Superedeas	0	5	0
Scire facias (except those specially mentioned)	0	10	0

ORDERS IN CHANCERY.

xxiii

	<i>£</i>	<i>s.</i>	<i>d.</i>
Venditioni expensas	0	15	0
Venire	0	15	0
Ventre inspiciend'	0	15	0
Viridario eligend' or amovend' :	0	10	0
Writ of Privilege	0	15	0
For resealing every Writ	0	2	6

COTTENHAM, C.
LANGDALE, M. R.



REPORTS OF CASES

ARGUED AND DETERMINED

IN

THE HIGH COURT OF CHANCERY.

BLENKINSOPP v. BLENKINSOPP.

1845: July 7.

An order for leave to serve a party abroad, is not irregular on the face of it, merely because the affidavit on which it was obtained states only the place of the party's residence, without any other circumstances to warrant the order.

THIS was a motion to discharge an order made by the Master of the Rolls under the thirty-third general order of May 1845, giving the plaintiff liberty to serve a subpoena on the defendant "at Holyrood or elsewhere in Scotland." The affidavit on which the order was made merely stated that the defendant resided within the precincts of the Palace of Holyrood.

Mr. *Wakefield* and Mr. *Faber* for the motion, insisted that the affidavit ought to have stated the nature of the suit so far at least as to satisfy the court that if the person of the defendant was out of its jurisdiction, the subject-matter of the suit was within it. Until the case of *Whitmore v. Ryan*,^(a) it was considered that the order of May 1845 applied only to the cases provided for by the acts of 2 W. 4. c. 33., and 4 & 5 W. 4. c. 82.; "but even according to that decision the exercise of the [^{*2}] authority given by the General Order was a matter of discretion, and consequently the circumstances of the case ought to be stated in the affidavit. They also cited *Buchanan v. Rucker*.^(b)

^(a) 4 Hare, 612.

^(b) 9 East, 192.

 1846.—*Blenkinsopp v. Blenkinsopp*.

Mr. *Glasse* and Mr. *Moxon* referred to *Brown v. Stanton*,^(a) and *Jones v. Geddes*,^(b) as cases in which similar orders had been made upon similar affidavits.

THE LORD-CHANCELLOR.—There is no necessary connection between this Order of May and the previous Acts of parliament. That order leaves it to the discretion of the court in what cases service shall or shall not be made on defendants abroad; but it does not expressly require any affidavits of merits. The court may be satisfied by inspection of the pleadings, or by any other means. Therefore the absence of such an affidavit in this case is no objection to the form of the order. The sole ground on which I am called upon to rescind it, is, that by possibility the case may be one in which the court ought not to have made the order; that the property in question may perhaps be situated abroad. If that be the fact, it ought to have been stated now upon affidavit; but I cannot assume it for the purpose of discharging the order. Whether the right course was adopted in the court below for the purpose of ascertaining whether the present case was a proper one for making the order, is not now the question; but I cannot discharge the order upon a mere suggestion that the case may possibly not be of that nature.

Motion refused with costs.

[*3] *ATTORNEY GENERAL v. CORPORATION OF WORCESTER.

1846: July 7, 8.

The proper style of municipal corporations in cities is the "Mayor, Aldermen, and Citizens," and not the "Mayor, Aldermen, and Burgesses of the city." [1]

Leave given to amend the title of an answer, although the application was opposed by the plaintiff.

THE defendants having been described in the Information as the Mayor, Aldermen, and Burgesses of the city of Worcester,

(a) 15 Law Journ. 65.

(b) *Ibid*.

[1] See *The Corporation of Rochester*, 15 Sim. 376.

and having put in their answer under the same style, afterwards applied to Vice-Chancellor Wigram for leave to amend the title of their answer by describing themselves as "the Mayor, Aldermen, and Citizens of the city of Worcester," in the information by mistake called "the Mayor, Aldermen, and Burgesses" of the said city.

The application was founded on an affidavit stating that the former had been the style of the corporation prior to the passing of the Municipal Corporation Reform Act, and that although they had for a short time after the passing of that Act described themselves by the other style under the impression that the style had been changed by the Act, they had since been advised that that was not the case, and had accordingly resumed their old style, and that the other had been used in this instance by inadvertence.

His Honor having refused the motion with costs, it was now renewed by way of appeal before the Lord Chancellor.

It was stated at the bar that the Vice-Chancellor had refused the motion without going into the question, what was the correct appellation according to the Municipal Corporation Act, (a) conceiving that the misnomer, even "if it were one, [*4] was of no practical importance in this suit to any one but the Attorney-General, and that if he was satisfied with it, there was no necessity to alter it. On the present occasion, however, both parties appealed to the Act, and the argument turned exclusively on the question whether, according to its true construction, the proper style of municipal corporations in cities was the "Mayor, Aldermen, and Burgesses," or the "Mayor, Aldermen, and Citizens of the city."

Mr. *Rolt*, in support of the motion, referred to the 57th, 61st, 137th, and 142nd clauses of the Act.

Mr. *Wood*, *contra*, relied on the sixth clause.

THE LORD CHANCELLOR, on the following day, said he had looked at the clauses which had been referred to, and was of

1846.—Attorney-General v. Corporation of Worcester.

opinion that it was clear from the sixth clause, taken in connection with the interpretation clause, that in cities the style of the corporation was to be "the Mayor, Aldermen, and Citizens." If any doubt could arise upon these clauses, it was completely removed by the 137th clause relating to the two Universities of Oxford and Cambridge. The motion must therefore be granted, the defendants paying the costs of the motion in the court below, but no costs of the appeal.

[*5]

*WATSON v. PARKER.

1846: July 15.

On the rehearing of a creditor's suit in which the plaintiff claimed as assignee of a deed of covenant alleged to have been executed by the testator, it appearing from the evidence of one of his own witnesses, that the benefit of the deed, which was not forthcoming, had been assigned to him without consideration, for the express purpose of qualifying the covenantee to be a witness to prove its contents, and the plaintiff having failed in the due preliminary proof of the execution of the instrument and of its loss, the Lord Chancellor reversed the decree of the court below, by which certain inquiries were directed as to these points, and retained the bill, with liberty to the plaintiff to bring an action.

Semble. If the execution and loss of the deed had been duly proved, the covenantee would have been a competent witness to prove its contents, as he swore positively on his cross examination that the assignment was absolute, and that he had no personal interest in the suit, and the suit being for payment out of assets in a course of administration, and therefore not brought here solely for the purpose of changing the jurisdiction.

Where an objection to evidence at the hearing of a cause is allowed, the tender of the evidence and its rejection ought to be expressly recited in the decree, and the evidence ought not to be entered as read.

THIS was a creditor's suit against the executor and devisees of the debtor. The plaintiff's title to sue rested on a voluntary deed of covenant which was alleged to have been executed by the testator in 1811 to one Thomas Oswald, who was also a defendant, for securing to him on the death of the testator payment of the sum of 3000*l.*, and the benefit of which Oswald had assigned, without consideration, to the plaintiff. The deed, which was alleged by the bill to be in the possession of the defendants,

1843.—*Watson v. Parker.*

who had had notice to produce it, not being produced at the hearing, the plaintiff was driven to establish his claim by secondary evidence.

For that purpose he tendered the evidence of the defendant Oswald, who had been examined under the usual order, and who deposed to the contents of the deed and the names of the attesting witnesses; and though, on his cross-examination, he admitted that he had made the assignment solely for the purpose of rendering himself competent as a witness for the plaintiff, he positively denied having any personal interest in the result of the suit. His evidence was rejected by Vice-Chancellor Knight Bruce,^(a) and there being no *sufficient evidence, without his, of the deed having ever existed, of its being lost, or of its contents, the Vice-Chancellor, by his decree, referred it to the Master to make certain inquiries directed to these three points, and reserved further directions and costs. The defendants, the executors and devisees, appealed from that decree.

On the hearing of the appeal,

Mr. *Wakefield* and Mr. *Steer*, for the appellants, again objected to the competency of Oswald as a witness, on the ground that the assignment to the plaintiff would not prevent him from making a subsequent assignment to another person for value, inasmuch as a subsequent assignee might gain a priority over the plaintiff by giving the first notice to the parties liable to pay. *Dearle v. Hall*.^(a) They also urged the inconsistency of allowing a mere legal demand, as this was, to be established in a court of equity by evidence which would not be available at law, as the witness himself would then be plaintiff.

With respect to the first of those grounds of objection, the Lord Chancellor observed, that this suit would itself be such notice to the parties liable to pay as would effectually prevent Oswald from defeating the assignment to the plaintiff by any other: and as to the second, that the cause of the plaintiff's resorting to this court was not merely that he was assignee of a

(a) The suit was pending before the passing of 6 & 7 Vict. c. 85. (b) 3 Russ. 1.

1846.—*Watson v. Parker.*

debt, but that he had a claim upon assets which could only be administered here. His Lordship, however, added that it was premature to decide upon the admissibility of Oswald's evidence, until it had been proved in the usual way that the deed had ever existed, and if so, that it was lost.

[*7] *The plaintiff's counsel then proved the death of one of the persons stated by Oswald, in his evidence, to have been the attesting witnesses to the deed; but the only evidence as to the other was that of a person named Rickwood, who stated that he had formerly known him, and that he had heard from his (the attesting witness's) father and sister, that he had gone, sixteen years ago, to America, and had not been since heard of.

Mr. *Russell* submitted that this evidence, though imperfect, was sufficient to entitle the plaintiff to an inquiry. *Cox v. Allingham*,^(a) *Hart v. Hart*.^(b)

Mr. *Wakefield*, on the other hand, insisted that the bill ought to be dismissed, and that the plaintiff, being a volunteer, had no claim to indulgence. *Martin v. Wichelo*.^(c)

THE LORD CHANCELLOR.—The object of the suit is to enforce a covenant against the estate of the covenantor. The claim is properly brought here, because, if made out, it is to be satisfied out of the assets in a course of administration. It cannot, therefore, be said that the plaintiff comes here only because he could not recover at law. The party legally entitled has assigned his interest to the plaintiff avowedly for the purpose of making himself a witness in support of the claim. I certainly never saw a case in which that was so distinctly avowed, though, no doubt, the same thing must have occurred in other cases; and though it is a practice not to be encouraged, I should have felt great difficulty in rejecting his evidence, if the case had arrived [*8] at that stage at which it *could properly be tendered.[1]

(a) Jac. 337.

(b) 1 Hare. 1.

(c) Cr. & Phill. 257.

[1] That a party disqualified by reason of interest may be rendered competent by an unqualified assignment of his interest, see *Heath v. Hall*, 4 Taunton, 326;

1843.—*Watson v. Parker.*

But his evidence being all of a secondary nature, it was incumbent on the plaintiff to lay a ground for it by proving that the alleged deed had ever existed, that it had been executed, and had been lost. In that, however, he has failed, and the only question is how, under such circumstances, the court ought to deal with the suit.

In bills by creditors seeking payment out of assets in a course of administration, the court exercises its jurisdiction as incidental only to the account; it has no original jurisdiction over the debt. The first question in such cases is as to the debt: if there is any doubt about that, before the court proceeds to administer the estate, it requires the plaintiff to establish his right at law; and for enabling him to do so, it will sometimes retain the bill, with liberty to him to bring an action. The question is, whether I ought to do so here, or to dismiss the bill at once. It seems probable that the result will be the same in either case; and though it would be much to be regretted, if the party who is really entitled to have this money should lose it solely from want of evidence, yet I do not think I ought to go further than to give him an opportunity of establishing his claim, if he can,

Boynston v. Turner, 13 Mass. 391. Where the interest of a legatee under a will has been assigned, he is thereby rendered competent to prove the will, though the payment is only secured to him by a bond, which is not yet due. *McIlroy v. McIlroy*, 1 Rawle, 423.

So, a stockholder of a mortgaged corporation may be rendered a competent witness for the corporation by a transfer of his stock, either to the company, or to a stranger, even though he intends to repurchase it, and has assigned it merely to qualify himself to testify; provided there is no agreement between him and the assignee or purchaser for a reconveyance. *Gilbert v. Manchester Iron Co.*, 11 Wend. 627. *Utica Ins. Co. v. Cadmus*, 3 Wend. 296. *Stall v. The Catskill Bank*, 18 Wend. 406. *Bank of Utica v. Small*, 3 Cow. 770. *Bell v. Hull, &c., Railway Co.*, 6 M. & W. 701.

Where a father assigned a mortgage to a son in consideration of natural love and affection, and who intended to charge it as an advancement, he has been held to be a competent witness to sustain the mortgage; for the reason that by the assignment the claim became vested in the son, and the father had no legal interest in it. That the failure to collect the debt, imposed no legal obligations on the assignor; and although, under such circumstances, the father may intend to make up the loss to the son, yet such intention not growing out of any legal obligation on him, is insufficient to exclude him as a witness. *Van Meter v. McFadden's Ex'rs.*, 8 B. Mon. Law and Eq. R. 440.

 1846.—*Watson v. Parker.*

at law. The only other course would be to direct inquiries before the Master, as the Vice-Chancellor has done; but though that is sometimes done where, owing to a slip, the plaintiff's evidence is left incomplete, I am by no means disposed to encourage a practice of that sort, more particularly where the plaintiff's case is founded on a legal demand.

In the course of the discussion, the Lord Chancellor remarked upon the form of the decree, which was as follows—

[*9] "This cause coming on &c., upon debate of the matter and hearing the answers of the several defendants, and the exhibits marked B. &c. to G. [enumerating the exhibits and stating their respective purports,] and the proofs taken in the cause, read, and what was alleged by counsel on both sides, and all the defendants, except the defendant Thomas Oswald, by their counsel objecting to the evidence of the said defendant Thomas Oswald being received, and also objecting to a certain exhibit marked A., purporting to be a draft of a deed, being read, this court doth reject the evidence of the said defendant Thomas Oswald, and doth also reject, for the present, the said exhibit marked A. as evidence, without prejudice to any question whether the same shall or shall not be hereafter admitted as evidence; and it is ordered that it be referred to the Master to inquire, &c.(a)

THE LORD CHANCELLOR said—This decree states the objection to the evidence, and that the court rejects the evidence, as if that were part of the decree; whereas it should be merely preliminary to the decretal part. In this case it may be mere inaccuracy of language, but I wish to take this opportunity of observing upon a form of decrees, of which I have lately seen some instances in the appeals to the House of Lords. In one of those cases an objection had been made to evidence, and the decree noticed that the court received it *de bene esse*, and stated that it had been read, but did not make any adjudication as to whether it was receivable or not. The consequence of that course is, that in the House of Lords, where we know nothing

 1846.—Watson v. Parker.

of the evidence except what appears upon the decree, we have no means of knowing whether the court below ultimately acted *upon the evidence or not. The court ought, in [*10] such cases, to state in its decree that the evidence had been tendered, but rejected, if that be the fact, and in that case the evidence should not be entered as read.

 IN THE MATTER OF WEBB.

1846: July 20.

Where there is a contest between several parties for the carriage of a commission of lunacy, the court considers only which of them is most likely to bring out the truth, and no regard is paid to proximity of relationship or other considerations of that kind, though these are of importance when the question is as to the appointment of a committee.

In a contest for the committeehip of lunatic, the party who has had the carriage of the commission, is not on that ground entitled to any preference.[1]

Where the issuing of a commission of lunacy is opposed, or the carriage of it contested, the court will not prospectively give leave to any party to propose himself as committee in the event of the subject of the commission being found of unsound mind, but in issuing the commission, will direct that no proceedings be taken for the appointment of a committee until further order.

THREE petitions were presented in this matter, praying a commission to inquire into the state of mind of a gentleman of the name of Webb, a bachelor, who was residing at a *Maison de Sante* at Montmartre, near Paris, but who was tenant for life of real estates in England producing a rental of upwards of 12,000*l.* per annum:—

The first of the petitions in point of date was presented on behalf of the infant tenant in tail in remainder by his mother as his next friend, he being the son of a natural brother of the alleged lunatic. On that petition coming on to be heard before Lord Lyndhurst in May last, it was opposed on the part of a natural daughter of the alleged lunatic, who had resided with him at Paris up to the time of his confinement, and who was

[1] See same case, *post*, 116.

1846.—In re Webb.

named as residuary legatee in a will which he had made while of sound mind, the ground of her opposition being a statement of her belief that his malady was of a temporary nature ; [*11] and that his removal, which *was then contemplated, to the place where he now was, would probably restore him. The Lord Chancellor, upon that suggestion, directed that the petition should stand over until this day. In the mean time the state of the lunatic being such as in the opinion of his medical attendants afforded very little prospect of his recovery, the second petition was presented by the daughter, praying that she might have the carriage of the commission ; and the third petition was afterwards presented for the same purpose by an insurance company, in which the lunatic had insured his life in a large sum of money.

Mr. *Romilly* and Mr. *Busk* now appeared in support of the first petition.

Mr. *James Parker* and Mr. *Walford*, for the second.

Mr. *Bacon*, for the third.

It being admitted on all hands that the party was a fit subject for a commission, the contest was solely for the carriage of it ; it being urged on behalf of the daughter that from the affectionate terms on which she had always lived with the lunatic, and the interest which on all accounts she might be supposed to have in the prolongation of his life, she was more likely to conduct the inquiry with a due regard to his feelings and comfort than the petitioners in the first petition, who had never concerned themselves about him until that occasion. The claim of the insurance company was rested on similar grounds of interest in the duration of the party's life.

THE LORD CHANCELLOR.—The arguments which have been urged in support of the second and third petitions might [*12] be very material if *the question were the appointment of a committee of the person, but the sole question now

1846.—*In re Webb*.

is, who is to have the carriage of the commission, and in determining that I have only to consider which of the parties is the most likely to bring out the truth.[1] Now it appears that the issuing of the commission on the first petition was delayed on a suggestion which turned out not to be realized, that the malady was of a temporary nature, and that the party was likely to recover. I must infer from that that there was an indisposition in the daughter, no doubt from the most proper motives, to admit that the party was a proper subject for a commission; and looking to that circumstance, I think there is more chance of the truth being brought out by the first petitioner, who has a very sufficient interest, than by the second. It is quite another question who is to have the custody of the person: that will have to be determined when the party shall be found to be of unsound mind.

Mr. *Walford* then stated that the practice of the Commissioners was to give a preference, in the appointment of committee, to the party who had had the carriage of the commission, unless some good reason were shown to the contrary; and that practically, therefore, the two questions were connected.

THE LORD CHANCELLOR.—I know of no such rule, and I cannot recognize it; it would be a very improper rule if any such existed.

Mr. *Parker* then asked that his client might be at liberty to attend the execution of the commission, and to propose herself as committee of the person in the event of the party being found of unsound mind; observing that by the 10th of the new Orders in lunacy *(27th of October 1842,) on a party [*13] being found lunatic, the Commissioners proceeded to appoint committees without any special order.

[1] See *In re Nesbitt*, post 245; *In re Webb*, 2 Coop. 145. In a competition between the brother and the wife of an alleged lunatic for the carriage of the commission, the Lord Chancellor gave a preference to the brother, on the ground, that in the particular case, the wife had an interest in preventing proof of the lunacy being carried back beyond a certain period. *In re Whittaker*, 4 Mylne & Cr. 441.

 1846.—*In re Webb*.

THE LORD CHANCELLOR.—The new practice may be productive of great inconvenience. Suppose any party disputes the finding of the inquisition, and comes here to set it aside: in the mean time the committee would be appointed. I cannot make a prospective order on the supposition that the party will be found of unsound mind: that would be quite irregular. The only order I can make at present is, that the commission shall issue with liberty to Mr. *Parker's* client to attend the execution of it, but that no proceedings be taken for the appointment of a committee without further order.^(a) There should also be a commission to examine witnesses at Paris.

With respect to the third petition, and the costs of it,

THE LORD CHANCELLOR, addressing Mr. Bacon, said—You have no personal connection with the lunatic; your right to interfere is no better than that of any other incumbrancer on his estate. What is more, you do not come forward because no one else will, but after two members of the family have applied. You come solely for your own protection, and ask much more than is necessary for that purpose. If you choose to present such a petition, you must pay the costs of it. You may, if you wish it, have leave to attend the execution of the commission, but it must be at your own expense.

[*14]

TURNER v. NEWPORT.

1846: July 22.

Part of a testator's residuary estate consisted of a bond debt, which, owing to the insolvency of the debtor's estate, was not recovered until many years after the testator's death, when the gross sum recovered in respect of principal and interest did not equal the amount of the original debt. *Held*, that as between the tenant for life of the residue and those in remainder, the former was not entitled to receive what had actually been recovered in respect of interest, but only the amount of interest at 4 per cent. on the sum which the bond would have realized if the

^(a) A similar order was made a few days afterwards under similar circumstances, in the *Matter of Westbrook*.

1846.—*Turner v. Newport*.

debtor's estate had been administered at the end of a year after the testator's death.

THIS was a suit for the administration of the estate of Lady Page Turner, who died in the year 1828, having by her will bequeathed her residuary estate to trustees in trust for Lady Barron, who was a defendant, for life, and after her death for several other persons, some of whom were the plaintiffs. Part of the residuary estate consisted of a bond executed in 1815 by one Howell in the penal sum of 11,985*l.* 16*s.*, for securing payment of 5992*l.* 18*s.* and interest at 5 per cent. Howell died in the year 1819, and his estate, which was insolvent, was administered by the court in a suit of *Cooke v. Oswin*, but his assets, owing to difficulties which occurred in realizing them, were not distributed until the year 1838, when they were divided rateably between the different creditors who had proved, and the sum of 3348*l.* 17*s.* 6*d.* was paid to Lady Barron as personal representative of the testatrix, in respect of the sum of 11,985*l.* 16*s.*, the penalty of the bond, the principal and interest due thereon having a few months before reached that amount.

By the decree in the present suit, the Master was directed in taking an account of the monies which had come to the hands of Lady Barron as personal representative, to distinguish principal from interest.

The Master in his report, dated the 2d of November 1843, included among the sums with which he charged Lady Barron in respect of interest, the sum of 1005*l.* *as being [*15] the proportion of the whole dividend received by her from Howell's estate, which was attributable to the amount of interest upon the bond from the death of the testatrix to the time when the principal and interest amounted to the penalty; and the remainder of that dividend, being attributable to the amount of the principal debt and interest accrued previous to the death of the testatrix, he included among the sums with which he charged Lady Barron in respect of the capital of the testatrix's estate.

To that part of the report the plaintiffs took exceptions, upon the argument of which and the hearing of the cause for further directions the Vice-Chancellor of England made an order, al-

1c46.—Turner v. Newport.

lowing the exceptions and declaring that the whole of the sum of 3848*l.* 17*s.* 6*d.* received from the estate of Howell was part of the capital of the testatrix's estate.

Lady Barron, as tenant for life, appealed from that part of the order, and the directions consequent upon it. And the appeal now coming on to be heard,

THE LORD CHANCELLOR, on the above facts being opened, said—As to the exceptions, I do not see how it can be said that the master has done wrong; he was directed to distinguish principal from interest, and he has done so. The proof consisted partly of principal and partly of interest, and he has taken the proportional parts of the dividend. He then goes on to say, that he had been asked to allow the 1005*l.* to Lady Barron, but that he had declined to do so, because he was not authorized by the decree to adjudicate upon the rights of the parties; in which he was quite right.

Mr. *Kenyon Parker*, and Mr. *Fleming* appeared for the [*16] appellant, and contended that she ought to be allowed in her accounts the whole of the sum of 1005*l.*, which the master had found to have been received in respect of interest accrued since the testatrix's death.

Mr. *James Parker* and Mr. *Freeling* for the plaintiffs, argued in support of the view taken by the Vice-Chancellor; contending, that as the sum recovered did not amount to the principal of the debt, it was to be dealt with in the same way as an ordinary reversionary interest, not falling in until some years after the testatrix's death, and in respect of which, as it yielded no interest until it came into possession, the tenant for life could not claim any; *Crawley v. Crawley*.^(a)

THE LORD CHANCELLOR.—Do you contend for it, as a general proposition, that a tenant for life who is entitled to the income of the residue in its converted state, is to get nothing until the property is converted? All that the court does is, to take

(a) 7 Sim. 497.

1846.—Turner v. Newport.

care that the tenant for life does not get too much. In this case, the debt forms only part of the estate, but the principle is the same as if it constituted the whole.

Mr. *Parry*, for one of the defendants, (a child of Lady Barron) who was in the same interest with the plaintiffs, suggested a middle course between the two that had been so contended for, namely, a reference to the master to ascertain the value of the bond at the expiration of a year after the testatrix's death, having regard to the time when, and the amount at which it was ultimately realized; and that the tenant for life should be allowed such part of the 3848*l.* 17*s.* 6*d.* as should be equal to the amount of interest at 4 per cent. *on such [*17] valuation from that period, until the year 1838, when the debt was realized.

Mr. *Kenyon Parker* having, on the part of his clients, expressed himself satisfied with that,

THE LORD CHANCELLOR said—This case, though certainly peculiar in its circumstances, appears to me to be governed by one of the most ordinary principles in the administration of assets. A portion of the testatrix's estate consisted of a debt. The debtor's estate was insolvent, and for several years after the death of the testatrix, nothing was recovered, either in the shape of principal or interest. At length a sum is realized; and then when the question arises what part of it is, as between the parties, to be considered as principal, the tenant for life is told, that, because the gross sum recovered is less than the amount of the original debt, she is to have nothing. Such a proposition is contrary to the plainest principles of justice, particularly when it is considered that the court itself has restrained her from getting in the debt sooner, in the hope that more might be ultimately recovered. But the other proposition is equally untenable—that she is entitled to the whole of what has been recovered in respect of interest since the testatrix's death. For, besides that there is nothing in the will to entitle the tenant for life to the interest of the residue in its actual state of investment

1846.—Turner v. Newport.

at the death of the testatrix, the circumstances of the estate out of which this debt was to be paid, may have been such as to make such a proposition doubly unfair towards the parties interested in the capital. Suppose, for instance, that if, while interest was accruing upon the debts, the fund for payment of them was producing no interest at all, or a lower rate of interest, [*18] it is obvious that the longer the recovery of the *debts was protracted, the more those parties would be prejudiced; for the proportion of the fund which would be ultimately attributable to the capital of the debts would be continually diminishing.

I think, therefore, that the proper course is that suggested by Mr. *Parry*,—viz. to ascertain what the bond would have realized if the debtor's estate had been administered at the expiration of a year after the testatrix's death, and to allow the tenant for life interest at 4 per cent. on that amount. I have not the means, without knowing more of the history of the debtor's estate than I do, of determining what that amount is; but the master, who knows all the history of that estate, will have no difficulty in prosecuting the inquiry, and coming to a conclusion upon it.

The order, therefore, which I shall make, will be to discharge so much of the Vice-Chancellor's order as is the subject of the appeal, neither to allow nor disallow the exceptions, but to refer it back to the master to make the inquiry that I have mentioned.

Order.—Refer it back to the master, to inquire and state what the value of the bond was at the end of the year from the death of the testatrix, and to calculate interest thereon at 4 per cent. to the date of his report. This appeal to stand over, and costs reserved till the master shall have made his report.

Reg. Lib. 1845, B. f. 1636.

1846.—*Nokes v. Seppings.*

**NOKES v. SEPPINGS.*

[*19]

1846: July 24.

A trustee charged with misapplication of trust moneys, admitted by his answer that he had misapplied three sums, and set forth a debtor and creditor account, in which he credited himself with, amongst others, those three sums, and also with a fourth sum which was equally inadmissible, but which turned the balance of the account in his favor. On a motion for payment of the three sums into court *Ald.*, that the plaintiff, not having in his motion challenged the fourth sum, the motion could only be granted to the extent to which the answer admitted a balance after striking those three items out of the discharge.

THE plaintiff had, by an indenture, conveyed and assigned certain real estates and farming stock to the defendant Seppings, on trust to cultivate and manage the estates, and out of the profits to pay certain mortgage debts, one of which was due to himself, and subject thereto in trust for the plaintiff.

The bill was filed for the execution of the trusts of that indenture and an account; and, among other things, it charged the defendant with having applied three sums of the monies received by him, amounting in the whole to 1326*l.* 8*s.* 4*d.*, to purposes not warranted by the trusts.

The defendant, by his answer, admitted the alleged misappropriations; but stated, in justification of them, that the plaintiff had, contrary to the stipulations of the deed, resumed possession of some of the farms on the estate, and had carried away and sold some of the crops raised thereon by the defendant, without accounting for the proceeds; and, in the schedule to his answer, he set forth a debtor and creditor account, in which were included, among other items of discharge, the three sums above mentioned, and also another sum of 274*l.*, which he claimed to retain for commission and personal trouble, by means of which last item he made it appear that there was a balance of that amount in his favor.

Upon that answer the plaintiff moved before the Vice-Chancellor of England for payment into court of the three sums above mentioned, which his Honor ordered accordingly.

**Mr. James Parker* and *Mr. Smythe* now moved, on [*20]
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1846.—*Nokes v. Seppings*.

behalf of Seppings, to discharge or vary that order, on the ground, first, that the plaintiff was not entitled to this summary relief for a breach of trust, which, it appeared from the answer, he had himself provoked by a breach of contract on his part; and, secondly, that there was no admission in the answer that he had a balance in hand to the amount of these sums. They said that, with reference to that objection, the Vice-Chancellor had considered an application for payment of specific items, respecting which there was an admitted breach of trust, as distinguishable from a motion for payment of a gross balance; but they insisted that, in whatever shape the motion was put, a defendant could never be liable to pay in more than he admitted having in hand.

Mr. *Walker* and Mr. *Rogers*, *contra*, said, that where an answer distinctly admitted a misapplication of trust monies, as to which there could be no contest in the cause, they would be ordered to be paid into court, notwithstanding there might be collateral matters in dispute between the parties. And that, as to the 274*l.* for personal trouble, the claim was not only unwarranted by the terms of the trust, but impliedly excluded by them; and that it did not follow, because they had not expressly impeached that item by their motion, that it was to be treated as a valid claim. If, indeed, they had asked for payment of this as well as of the other sums, it might have been said that they were asking for more than the defendant admitted to be in hand. But they had moved only for the sums in question, on the assumption that an item which was clearly inadmissible for the purpose of discharge would not be allowed to stand in their way.

Mr. *J. Parker*, in reply.

[*21] *THE LORD CHANCELLOR.—On the main point I agree with the Vice-Chancellor, that the circumstances relied on by the defendant as an excuse for having departed from the provisions of the trust deed are no answer to the motion. There is a clear admission that he has applied certain sums to purposes

1843.—Nokes v. Seppings.

not warranted by the trust. But he says he was justified in doing so, because the plaintiff had violated his contract. That may or may not be matter of account between the parties at the hearing. If the statements of the answer are correct, it *will* be matter of account; but it furnishes no excuse for misapplying the monies which may come to his hands in the mean time. It is clear, therefore, that the money which had been so misapplied could not be allowed to remain in the hands of the defendant.

On the other point, however, I am as clearly of opinion that the Vice-Chancellor's order is erroneous. The defendant, the accounting party, alleges a claim against the trust estate for his personal trouble, and he has inserted the amount of that claim as an item of discharge in his account. The order of the Vice-Chancellor was for the payment into court of a particular sum, on the ground that certain items in the discharge, amounting to that sum, and which were the only items mentioned in the notice of motion, were to be disallowed. But the effect of disallowance is only to deprive the defendant of the benefit of so much in his discharge: it is clear, therefore, that it must be seen what effect that disallowance has upon the balance.

It is said on one side that the Vice-Chancellor, in making the order which he did, considered the defendant not to be entitled to retain the 274*l*. That is disputed on the other side; but however that may be, I *conceive that he could not [*22] properly enter into the question of the allowance or disallowance of that item; for it was not challenged by the motion. The plaintiff might have moved for that item as well as for the others: and he may still do so by another motion; but I am clearly of opinion that, upon the motion actually made, it must be taken that the defendant is entitled to retain the 274*l*.; and consequently that the order ought to have been only for the balance of his account after striking out of the discharge the items specified in the motion, and that it must be varied accordingly.

On the understanding that the latter point was raised before

 1843.—*Manson v. Burton.*

the Vice-Chancellor, I give no costs: otherwise I should have given the respondent the costs of this motion.

RANKIN v. HARWOOD.

1846: July 25.

The court will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to go in and prove his debt.

THE original bill in this cause was filed by a mortgagee for a sale of the mortgaged estate. On the 5th of April, before it came to a hearing, the defendant, the mortgagor, died, and a bill of revivor and supplement was filed against his executor, and a decree obtained on the 6th of June, by which it was ordered that an account should be taken of what was due on the mortgage, that the estate should be sold, and that if the proceeds should be insufficient to pay the debt, and the executor should not admit assets of the testator to make good the deficiency, the usual accounts of the testator's estate should be taken. Three days before the death of the testator, a judgment creditor of his had issued a writ of *fi. fa.* to the sheriff of Surrey, [*23] under which a levy *was made on the 1st of July. On the 2d, notice of the decree was served on the sheriff, and on the 7th a motion was made by the executor before Vice-Chancellor Wigram for an injunction to restrain the Sheriff from selling the goods or parting with them to any one but the executor. His Honor having refused the motion with costs, it was now renewed before the Lord Chancellor.[1]

Mr. *Romilly* and Mr. *Pole*, for the executor.

Mr. *Rolt* and Mr. *Harwood* for the judgment creditor.

The argument turned chiefly on the effect of the issuing of

[1] The case before V. C. is reported 5 Hare, 215.

1846.—Rankin v. Harwood.

the writ and the delivery of it to the sheriff, in divesting the debtor of his property in the goods; the counsel for the executor relying on *Giles v. Grover*,^(a) in which it was held, that an extent by the crown took precedence of a writ of *fi. fa.* previously delivered to the sheriff, on the ground that the property in the goods was not altered thereby. While, on the other side, it was contended, on the authority of *Wms. Saund.* 219 *f.*, that the goods of the debtor were bound from the teste of the writ as against every one but a purchaser, and as against him, by the statute, from the delivery of it to the sheriff: and that it was immaterial, whether the property in the goods was altered to all intents, provided they were so far bound as to enable the creditor to prosecute the writ after the testator's death without any proceeding against the executor, which was the case here; and that this court never interfered with the rights of a creditor by injunction, except where he was proceeding against the executor.

They further contended, however, that the motion [*24] ought to be refused on another ground, which was not taken before the Vice-Chancellor; namely, that the suit was not, in fact, a creditor's suit. The bill did not purport to be on behalf of all creditors, and the decree was only contingently a decree for their common benefit.

THE LORD CHANCELLOR, on that point being raised, and the form of the decree being called to his attention, asked Mr. *Romilly* whether he could cite any instance in which the court had interfered on such a decree; and, on his answering in the negative,

His Lordship said, that that objection was a conclusive answer to the motion, for the court could not interfere, unless there was in existence a decree under which the creditor had a present right to go in and prove his debt, which he could not do here.

Motion refused with costs.

(a) 9 Bing. 128.

1846.—Hungate v. Gascoyne.

[*25]

*HUNGATE v. GASCOYNE.

1846: July 29.

When an application is made for leave to file a supplemental bill of review on the ground of the discovery of new evidence, the question is not merely whether the evidence is material, but whether it is of such weight as, when taken in connection with the mass of evidence adduced on both sides at the former hearing, would have been likely, had it been then brought forward, to have turned the scale.

In pedigree cases, an old will, by which the testator purports to leave all his property to collateral relations or friends, is regarded as very strong evidence of his having died without children.

THIS was an appeal from an order of the Vice-Chancellor of England, giving the plaintiff leave to file a bill of review on the ground of the recent discovery of new evidence.

The plaintiff claimed an estate as lineal descendant of a William Hungate, who died at Louvain, in the year 1719. On the original hearing the plaintiff's counsel, acquiescing in an observation from the court that the pedigree was not made out, gave up the case before the evidence had been fully gone through, and the bill was dismissed.

The present petition was resisted chiefly on the ground that the new evidence, though not wholly immaterial, was not of sufficient weight, in comparison of the counter evidence which had before been adduced by the defendant, to turn the scale.

It was stated at the bar that the Vice-Chancellor had expressed as the ground of his decision, that, on an application of this kind, the court was not called upon to adjudicate upon the whole evidence, but merely to see that the new evidence adduced was material to the issue, and that as, from the manner in which the case had been disposed of, the court had never, in fact, pronounced its opinion upon the evidence, he thought it right that the plaintiff should have an opportunity of bringing it forward with the addition of the new matter now proposed to be introduced.

[*26] *THE LORD CHANCELLOR, in giving judgment, said, that the question on applications of this kind, was not merely whether the evidence was material, but whether, looking

1846.—*Hungate v. Gascoyne*.

at the case made on the other side and the whole mass of evidence adduced on the former hearing, what was now brought forward would have been likely to have altered the judgment which the court then came to; [1] and being clearly of opinion that that was not the case in the present instance, he must discharge the Vice-Chancellor's order. With respect to the other circumstance which was said to have influenced the Vice-Chancellor,—namely, that the court had never, in fact, pronounced an opinion on the evidence, because the plaintiff's counsel, on seeing the mass of evidence produced against him, had given up the case,—his Lordship said, he could not countenance such a doctrine at all. It would be introducing a totally new practice into the court. A plaintiff, if he found he had the worst, would always desire to be nonsuited, as it had been called—though there was no such thing as a nonsuit in this court—in order to stand better on an application for leave to file a bill of review.

Part of the evidence adduced by the defendant was the will of William Hungate himself, by which, after several legacies to strangers, he bequeathed the residue of his estate to a nephew and a friend, whom he appointed his executors. On the question what degree of weight was to be attributed to that evidence,

THE LORD CHANCELLOR said, it was the commonest thing in the world in Peerage cases before the House of Lords, when the object was to prove that a man died without children, to produce his will, and if he took no notice in it of his fam-

[1] That the new matter must be relevant and material, and such as, if known, might probably have produced a different determination; see *Ord v. Noel*, 6 Mad. R. 127; *Blake v. Foster*, 2 Molloy, 257; *Wiser v. Blackley*, 2 John. Ch. R. 486; *Livingston v. Hubbe*, 3 John. Ch. R. 124; 1 Mitford Pl. by Jeremy, 84, 85. That the new matter must generally be such as tends to prove what was before in issue, and not such as tends to prove a title not before in issue; in other words, it must not make a new case, but establish the old one. *Denter v. Arnold*, 5 Mason R. 312; *Young v. Keighley*, 16 Ves. R. 348; *Norris v. Le Neve*, 3 Atk. 33, 35. See also, Story's Eq. Pl. § 415, 416, 417, and note 3 to sect. 415; *Bingham v. Dawson*, 1 Jac. R. 243.

 1846.—*Hungate v. Gascoyne*.

[*27] ily, but left what he had to leave *to strangers or collateral relations, it was always considered very strong evidence of his having died childless. That a man might quarrel with some one member of his own family, was not very improbable; but to account for such a will as that, he must be supposed either to have no children, or to have quarrelled with them all.

COLUMBINE v. CHICHESTER and others.

1846: July 29.

Demurrer to a bill against the provisional committee of a projected railway company for the specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates, allowed; there being no allegation in the bill that the defendants had in their possession any scrip to deliver, but statements, from which the contrary might rather be inferred.

Whether such an agreement is a subject for specific performance: *Query*.

THE bill in this case was filed against the members of the provisional committee and some other members of a company provisionally registered under the name of "The direct Exeter Railway Company," praying the specific performance of an agreement alleged to have been entered into by the provisional committee with the plaintiff, purporting to be an agreement on behalf of the company to pay to the plaintiff, who was a solicitor, and the original promoter of the undertaking, the sum of 812*l.*, and to deliver to him scrip certificate for 1000 shares of 5*l.* each, on which a deposit of 1*l.* 7*s.* 6*d.* should have been paid, and to pay him the sum of 812*l.* as a remuneration for services performed by him in advertising the project, collecting information as to the responsibility of parties applying for shares, and in other matters preliminary to the formation of the company.

The Vice-Chancellor of England having over-ruled a general demurrer to the bill, the defendants appealed.

Among many other points taken by the appellant's counsel in the argument, they contended that the court would not [*28] enforce an agreement for the sale of scrip, **Jackson*

1846.—*Columbine v. Chichester.*

v. Cocker,^(a) though it would, for the sale of shares in a company actually formed; *Duncuft v. Albrecht*.^(b) And that, as to the sum of 812*l.* the plaintiff's remedy was at law. They further observed that the bill contained no allegation that the defendants had in their possession a sufficient quantity of scrip to enable them to fulfil their contract, even supposing the agreement were one which on other grounds the court would enforce. On the contrary, the bill alleged that the number of applications for shares had exceeded the number of shares in the concern: from which, they contended, it was to be inferred that all the shares had been actually allotted.

Mr. *J. Parker*, for the respondent, being called on by the Lord Chancellor for an answer to the latter objection, submitted that it was to be presumed that the committee had retained a sufficient quantity of scrip to enable them to fulfil their contract: if they had not, it might be matter of defence by answer or plea, but that it was not open to them to suggest it on the argument of a demurrer. He also contended that the case of *Jackson v. Cocker* did not apply to the present: for here the plaintiff's contract was not a contract to take a transfer of scrip from an existing shareholder, but to be an original shareholder himself; which was a different thing.

THE LORD CHANCELLOR.—The presumption is always against the pleader, because the plaintiff is presumed to state his case in the most favorable way for himself, and, therefore, if he has left any thing material to his case in doubt, it is *assumed to be in favor of the other party. Now you [*29] call on the court to compel the defendants to do a certain thing, and instead of alleging that they *can* do it, you state that which leads to the inference, that they cannot, for you say more shares were applied for than there were shares to allot.[1] How

(a) 4 Beav. 59.

(b) 12 Sim. 189.

[1] Where it has become impossible, from subsequent events, for the party to perform his contract, as by a subsequent sale of the subject matter of the contract without notice, the court will not decree a specific performance. *Greenaway v. Adams*, 12 Vesey, 395, 400. *Varick v. Edwards*, 11 Paige, 278, 289.

 1846.—*Columbine v. Chichester*.

is the court in such a case to decree specific performance? Are the defendants to be ordered to buy scrip, or to create fictitious scrip for the purpose? It is said, that the Master of the Rolls has in one case refused to decree specific performance of a contract for the sale of scrip.[2] It is not necessary, however, that I should express any opinion on that point, for this bill does not contain allegation enough to raise it. I think, for the reason I have mentioned, that the demurrer ought to have been allowed.

Mr. Parker asked leave to amend.

THE LORD CHANCELLOR.—It is not a case for that: you may file another bill.

Mr. Stuart, *Mr. Bacon*, and *Mr. Hetherington* appeared for the appellants.

[*30] **DAMER v. EARL OF PORTARLINGTON.**

1846: July 30.

After a suit for the execution of the trusts of a deed, by which real estates had been vested in trustees for sale and payment of incumbrances, which were very numerous, was nearly ripe for hearing, the court, at the instance of the owner of the estates, ordered all the proceedings to be stayed on payment to the plaintiff of all his pecuniary claims in the suit and costs, (all other parties to the deed consenting,) although the plaintiff insisted that the execution of the trusts in this suit would incidentally affect other objects in which he was interested in reference to the estates comprised in it.

THE late Earl of Portarlington was seised in fee of large estates in Ireland, which were subject to various mortgages. In the year 1832, being desirous of consolidating those mortgages, he raised a loan of 344,000*l.* which was contributed by a num-

[2] See *Dolbett v. Rothschild*, 1 Sim. & Stu. 590; *Ford v. Elwes*, 4 Vesey 497; *Mullran v. Thornton*, 10 Vesey, 161; *Lady Arundel v. Phipps*, 10 Vesey, 148.

1846.—*Damer v. Earl of Portarlington*.

ber of individuals in different proportions ; and to secure the repayment thereof, he, by indentures of lease and release, dated the 3d and 4th September 1832, conveyed all his Irish estates, except one which he had recently purchased, freed and discharged of the former mortgages, to three trustees, on trust to enter immediately into the receipt of the rents and profits, and, after payment of outgoings and expenses of management, to apply the clear produce in payment of the interest of the said loan of £344,000*l.* and next in keeping down the interest of a sum of £56,000*l.* due to the trustees of the Marquis of Lansdowne, and which was primarily secured on the excepted estate ; and subject thereto to pay the surplus to himself, his heirs, executors, administrators, and assigns. And it was provided that, if the said loan should not be repaid before the month of September 1840, the trustees should have power to sell the estates, and out of the proceeds to pay the two principal sums above mentioned, and the surplus to the earl, his executors, &c.

The earl afterwards encumbered the equity of redemption of the same estate with several mortgages to a large amount. In the month of August 1842, two of the original trustees under the deed retired from the trust, and the plaintiff, (who was a brother of the late earl), and another person, were [*31] appointed, under a power in the deed, trustees in their place.

The plaintiff, besides being a trustee of the deed, was also a contributor of £500 to the loan of £344,000, and one of the subsequent mortgagees for £13,000. Shortly after his appointment as trustee, he filed the original bill in this suit against the late earl, the present and former trustees, the several contributors to the loan of £344,000, and some of the subsequent incumbrancers (who were very numerous,) as representing all ; stating, among other things, that his predecessors, trustees of the deed, had retained and otherwise misapplied part of the rents, and that there were disputes as to the validity of his own appointment as trustee ; and praying that it might be declared in whom the legal estate of the mortgaged premises was vested, and, if necessary, that his appointment as trustee might be confirmed, and proper directions given for vesting the estates in himself

1846.—*Damer v. Earl of Portarlington*.

and his two co-trustees, and that certain sums, which the plaintiff had advanced on account of the trust estates as trustee, might be paid to him; and that his predecessors in the trust might account for their receipts, and pay the balance to be found due from them; that the trusts of the indentures of September, 1832, might be carried into effect, and that the estates comprised therein, or a competent part, might be sold, and that the mortgaged debt of £344,000 and interest might be paid off. The bill also prayed the appointment of a receiver, and an injunction to restrain several of the defendants from interfering with the trust estates, and for a delivery of deeds, &c.

After the late earl, and the other defendants who were within the jurisdiction, had put in their answers, and a receiver had been appointed, the late earl died, having devised one of [32] the estates comprised in the deed, *called the Roscrea estate, of the value of upwards of £3000 to the plaintiff, with a direction that it should be exonerated of all mortgages, &c. affecting it, out of his other estates, which he devised, subject to various annuities given by his will, to the plaintiff and another person in trust for the present earl, his nephew.

In the month of March, the plaintiff filed a bill of revivor and supplement against the present earl and the other parties who had acquired interests in the estates under the will. Shortly after that bill was filed, the defendant, the present earl, who had himself instituted a suit for the purpose of clearing the estates from incumbrances and, amongst others, from that created by the deeds of September, 1832, moved, before the Vice-Chancellor of England, to the effect that the proceedings in this suit should be stayed until he should have completed a loan for which he was then in treaty with an insurance company, to enable him to pay off the £344,000, and that in the mean time the trustees of the deed might allow the company access to the title-deeds for the purposes of investigating the title, &c.

That motion having been refused with costs, he afterwards gave notice of the present motion before the Lord Chancellor, praying that the order of the Vice-Chancellor might be discharged, and that (without prejudice to an order under which a receiver had been appointed) all further proceedings might be

1846.—*Damer v. Earl of Portarlington*.

stayed; he, the earl, undertaking to pay forthwith to the plaintiff the whole of the principal money and interest due to him as one of the contributors under the indenture of the 4th September, 1832, together with all his costs, charges, and expenses, properly incurred, and the other sums, payment of which was prayed by the original bill, and also undertaking to pay to the defendants, the *other contributors to the deed, the [*33] whole amount due to them respectively, and their costs; and also undertaking to pay to all the other defendants their costs, and submitting to such other terms, if any, as the court might direct.

Mr. *Stuart*, Mr. *Js. Parker*, and Mr. *Follett*, in support of the motion, cited *Haslett v. Cliffe*,^(a) *Holden v. Kynaston*.^(b)

Mr. *Lovat*, Mr. *Koe*, Mr. *Bagshawe*, Mr. *Toller*, and several other counsel appeared for different incumbrancers, all of whom consented to the motion except Mr. *Toller's* client, who was only an annuitant under the late earl's will.

Mr. *Bethell*, and Mr. *Roundell Palmer* for the plaintiff.—The mere payment of the plaintiff's personal demands under and in respect of the deed, will not exhaust his interest in the suit, or consequently justify the court in staying the proceedings; for he is interested in the accounts prayed against the other trustees, and in recovering the balances due from them, not only as being himself a subsequent incumbrancer to a large amount, but as being liable, in his character of trustee, to the other subsequent incumbrancers, (some of whom are not parties,) if, without their consent, he should forego the prosecution of these accounts.

[THE LORD CHANCELLOR.—He would be liable for his own acts, but not for the acts of any one else. He would not be liable for any misconduct of the trustees prior to his own appointment, merely because he did not file a bill against them.]

(a) L. C., 5 June, 1840, not reported.

(b) 2 Beav. 204.

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[*34] *It is of importance to the plaintiff, as a party interested in these estates, that all disputes as to the trusteeship should be settled, and that is one of the objects of this suit, which the other suit, instituted by Lord Portarlington, does not embrace.

[THE LORD CHANCELLOR.—I have nothing to do with any other suit. If I stay the proceedings in this suit, it will be on the ground that, by what the plaintiff offers to do, all the objects of the suit will be answered.]

If there are two suits on foot for the same object, why should the court give the preference to that which was last instituted? The plaintiff, as devisee of the Roscrea estate, is at least as much interested in having the estates cleared of their incumbrances as Lord Portarlington; for the surplus of the other estates, after paying off all incumbrances, will probably not be of equal value with that estate which is devised to the plaintiff clear.

[THE LORD CHANCELLOR.—This bill does not seek to have the Roscrea estate exonerated.]

Lord Portarlington, who offers to pay off the plaintiff, is not the owner of the equity of redemption, and yet no one else has a right to make such an offer; *James v. Biou*(a), *Garth v. Thomas*(b), *Lushington v. Price*(c)

Mr. *Stuart*, in reply.

On the conclusion of the argument,

[*35] *THE LORD CHANCELLOR said—Upon the general principle there can be no doubt, that where a suit is instituted, and the defendant comes and tenders all that the plaintiff asks, there is jurisdiction in the court to prevent the plaintiff from going on. The only question is, whether this case falls

(a) 3 Swanst. 234.

(b) 2 S. & St. 188.

(c) 9 Sim. 651.

1846.—*Damer v. Earl of Portarlington.*

within that rule. I will look through the pleadings before I dispose of it.

July 31.—THE LORD CHANCELLOR.—I stated yesterday the principle on which this case ought to be decided, which is not at all at variance with the Vice-Chancellor's order: for the motion made before him was quite of a different character, and embraced many things which he very properly thought he could not grant. The present motion only asks what is in accordance with the familiar practice of the court, if the allegations of the bill and the objects of the suit are such as to bring it within the principle.[1]

I have looked through the pleadings, and I cannot discern any relief except what is incident to the trusts of the deed of 1832. And as the defendant offers to pay the plaintiff all that he claims personally, either under that deed or otherwise, and all the other parties to the deed consent, I think the case is within the principle I have mentioned. My order will leave un-

[1] In *Holden & Mellish v. Kynaston*, 2 Beavan, 204, it was held, that where a debt is claimed, or a demand made in a suit, and the defendant, admitting his liability, offers to pay the debt or comply with the demand, and to put the plaintiff in the same situation as he would have been in if the liability had been satisfied without suit, the court, on motion, would stay all farther proceedings. In *Pemberton v. Topham*, 1 Beavan, 316, in a creditor's suit instituted by the plaintiff in behalf of himself and all other creditors, it was held, that the defendant was entitled, on motion at any time before decree, to have the bill dismissed on payment of the demand of the plaintiff, and his costs as between party and party; but if there were other defendants, their costs must also be paid. So, in a suit by a creditor on behalf of himself and all other creditors, if the debt of the plaintiff be admitted or proved, and the executor or administrator admit assets, the plaintiff is entitled at the hearing to an immediate decree for payment, and not to a mere decree for an account. *Woodgate v. Field*, 2 Hare, 211.

The cases which show, that where a defendant submits to the whole demand of the plaintiff, and to pay the costs, he has a right, at once, to stop all further proceedings, see in addition to the cases above cited, *Livell v. Abraham*, 8 Beavan, 598; *Boss v. Ford*, 4 Mad. 49; *Damer v. Lord Portarlington*, C. P. Cooper t. Cott. 229; *Field v. Robinson*, 7 Beavan, 66; *Præd v. Hull*, 1 Sim. & Stu. 332. But if there be a question in dispute as to the plaintiff's right to recover certain expenses, and the defendant does not advert thereto, the court will not interfere summarily to stop the suit. *Field v. Robinson*, 7 Beavan, 66. See also, 2 Beavan, 249.

1846.—*Damer v. Earl of Portarlington.*

touched all the other grounds of relief that the plaintiff may be entitled to as growing out of his connection with this deed, or the estates comprized in it: it disposes only of what arises immediately out of the deed.

The order will be, that further proceedings be stayed, on the defendant, the Earl of Portarlington, paying to the plaintiff [*36] within a fortnight the whole *of what is due to him for principal and interest, in respect of the several items of claims specified in the bill, together with all his costs, charges, and expenses properly incurred, including the costs of this suit. The other parties to the deed consenting to the order, no undertaking with respect to them will be necessary: if there be any one who does not consent, he must be paid.

Order—That, upon consent of the defendants claiming under the indenture of the 4th of September 1832, and upon the defendant Lord Portarlington paying within a month to the plaintiff all the sums claimed by the bill as due to him [specifying them,] with interest and his costs of the suit as between solicitor and client, subject to taxation as after mentioned, but without prejudice to the order made in the cause for the appointment of a receiver, further proceedings should be stayed till further order. And it was referred to the taxing master to tax the said costs, with a direction that the difference (if any) between the amount so to be paid as aforesaid in respect of such costs, and the amount thereof as taxed, should be paid by the said defendant to the plaintiff, or repaid by the plaintiff to the defendant, as the case might be. And it was referred to the taxing master to tax the costs of all the other defendants of the suit, including the costs of that application, and of any pending applications in the suit as between solicitor and client; and, all further proceedings being stayed, it was ordered that Lord Portarlington should pay to the said defendants respectively the amount of such costs; and any of the parties were to be at liberty to apply.

Reg. Lib. 1845, A. f. 2013.

 1846.—*Edwards v. Abrey.*

*EDWARDS v. ABREY.

[*37]

1846: July 30.

A wife, being of unsound mind and in confinement, and her husband being poor and unable so to maintain her, the court ordered that the surplus income of her separate property, after providing for her maintenance, should be paid to the husband, but refused to apply any part of the principal fund to reimburse the husband what he had actually paid for her past maintenance.

Whether, if the expenses of her past maintenance had been still unpaid, that circumstance would have made any difference, *Qu.*

THE defendant Mrs. Abrey was entitled, under the will of her father, to a sum of stock, part of his residuary estate, for her separate use absolutely. But as she was of unsound mind, though not found such by inquisition, the executor filed this bill against her and her husband, for the purpose of bringing the fund into court. By the decree the costs of the suit and the legacy duty were directed to be paid out of a sum which had arisen from dividends on the stock; and it was referred to the Master to inquire who had maintained Mrs. Abrey, and at what expense; whether her husband was of ability to maintain her, what was the amount of her fortune, and what was proper to be allowed for her past and future maintenance.

The Master found that her fortune consisted only of the stock in question, yielding an annual income of 90*l.*; that she had been of unsound mind ever since the year 1838, during the greater part of which time she had been kept at various private establishments for the care of lunatics, at one of which she was now residing; that the expenses of her maintenance and medical treatment in those establishments, amounting in the whole to the sum of 413*l.* had been paid by her husband; that he was a small farmer, with an income not exceeding 100*l.* per annum, including the average profits of his farm; that he had three children by her; and that he was not of ability to maintain her. The Master approved of 70*l.* as a proper sum to be allowed for her future maintenance.

*The case now came before the Lord Chancellor, on the [*38] petition of the husband founded upon that Report.

1846.—Edwards v. Abrey.

Mr. *Greene*, in support of the petition, asked that the petitioner might be repaid what he was found to have so expended, by a sale of part of the stock, which, he said, would leave sufficient to answer the 70*l.* allowed for future maintenance: he cited *Brodie v. Barry*,^(a) the reference in which, he observed, had extended to past as well as future maintenance, but that it did not appear what afterwards became of the case.

THE LORD CHANCELLOR.—Is there any case in which the court has repaid a husband for maintaining his wife? In *Brodie v. Barry* it does not appear who had had the care of the wife; the inquiry was, who had maintained her. That case is no authority for applying the wife's property to reimburse the husband. If it had appeared that the amount was still due to the parties who had had the care of her, it might be different; but there is not even a statement that there are debts of the husband unpaid arising from his expenses on account of his wife: he has proved, by paying, that he was of ability to pay. I am bound to look not only to the future maintenance of the wife under her present circumstances, but to her maintenance in the event of her husband's death.]

The will gave a power to the trustees to advance 500*l.* out of the fortune of each of the testator's daughters on their marriage; and though this daughter married in the testator's lifetime, and therefore the power in her case could not be exercised, the court may still act on the intention. It is obvious that the husband must have subjected his children as well as himself to great privations, in order to enable him to defray these [*39] *extraordinary expenses for his wife, the reimbursement of which would enable him to afford his children those comforts and advantages of which they have hitherto been deprived. The principle of the court in this application is to consider what is most for the benefit of the lunatic, with reference not only to herself personally, but to the other members of her family; *Ex parte Whitebread*.^(b)

(a) 2 V. & B. 36.

(b) 2 Mer. 99.

1846.—*Edwards v. Abrey.*

[THE LORD CHANCELLOR.—That is your difficulty.]

At all events your Lordship will grant the alternative prayer of the petition, that the amount of the costs of the suit and legacy duty which have been paid out of past dividends may be raised out of the principal, and that such amount, together with the surplus of future dividends, may be paid to the husband, though in that way it will be many years before he will be fully reimbursed.

THE LORD CHANCELLOR.—I think, as far as regards the costs of the suit and legacy duty, they were charges on the corpus, and the amount of them may, therefore, be raised and applied in repayment to the husband of what he has expended, as far as it will go: but as to the rest, it appears that the husband has actually maintained his wife, and paid the extraordinary expenses occasioned by her unfortunate condition; and, though his property is very small, it is not, nor can it be, the interest of the wife, or probably of the family at large, that any further part of the corpus of the fund should be so applied. As, however, the income of the fund would, if the wife were of sound mind, and living with her husband, be enjoyed for their common benefit, I can see no reason why the surplus of the income should be left in court, instead of being applied to the use of either the husband or wife. Therefore let the surplus be paid to the husband.

*GURNEY v. SEPPINGS.

[*40]

1846:—July 7.

S., in consideration of a loan of £10,000 from G., assigned to the latter two mortgages which he held upon an estate belonging to N., and executed another mortgage of an estate of his own by way of further security. Afterwards, on N.'s mortgage debts becoming due, S. brought an action against him on the covenants in his mortgage deeds, which G. filed a bill to restrain. On a motion before the Lord Chancellor to discharge an injunction which had been granted by the Vice Chancellor—*Held*, that it ought not to have been granted, except upon the terms of the plaintiff reconveying S.'s mortgage and releasing him from his mortgage debt,

1846.—Gurney v. Seppings.

and the plaintiff now declining these terms, and S. undertaking that the sum to be recovered in the action should be paid to the plaintiff, the injunction was dissolved.

In the month of January, 1845, the plaintiffs, who were bankers at Norwich, advanced to the defendant Seppings £10,000, and, to secure the repayment thereof, with interest, Seppings assigned to them two mortgages for £5000 each, upon the estate of the defendant Nokes, and also executed to them a mortgage upon an estate of his own by way of further security.

In the month of October, 1845, the time for payment prescribed by the two indentures of mortgage from Nokes to Seppings having expired, Seppings brought an action against Nokes upon the covenants for payment contained in those indentures; whereupon the plaintiffs filed this bill charging that both Seppings and Nokes were in embarrassed circumstances; that the plaintiffs disapproved of the action, as likely to prejudice their security; and that, if Seppings should be allowed to recover payment of the amount for which the action was brought, it would be utterly lost to the plaintiffs; and praying that Seppings might be restrained from prosecuting that action, and from commencing any other action against Nokes for recovery of the two mortgage debts of £5000, except by the authority and consent of the plaintiffs, so long as their mortgage debt of £10,000 should remain due; and that Nokes might, during such period, be restrained from paying over the mortgage debts of £5000, or the interest thereof, to Seppings, or any other person than the plaintiffs.

[*41] The plaintiffs having obtained an *ex parte* injunction to restrain the action, Seppings moved to dissolve it upon his answer; but the Vice-Chancellor of England refused the motion, with costs, on the ground, as was now stated at the bar, and which was, in fact, insisted on by the answer itself, that the plaintiffs, by obtaining the injunction, had, in effect, waived their rights against Seppings and his estate in respect of the mortgage debt of £10,000.

The motion was now renewed, by way of appeal, before the Lord Chancellor.

1846.—Gurney v. Seppings.

Mr. *James Parker* and Mr. *Smythe*, for the appeal motion, contended that Nokes and Seppings stood to the plaintiffs in the respective positions of principal debtor and surety; and that from the moment when Nokes' debts to Seppings became due, Seppings had a right to compel payment thereof to the plaintiffs for the purpose of discharging himself and his own estate from liability, which he had, from the first, expressly informed the plaintiffs was his object in bringing the action. That if the effect of the injunction was such as the Vice-Chancellor had considered it, the granting of it ought to have been accompanied with an order for the re-conveyance of Seppings' estate, and a release of his covenants with the plaintiffs; for it would be very unjust towards the defendant to oblige him to institute a new suit for the purpose of getting a re-conveyance of his estate, even supposing the point to be clear; and not less unjust, but rather more, if it were doubtful.

Mr. *Walker* and Mr. *Rogers*, *contra*, contended that, if the defendant's argument were right, that Nokes was to be considered as the principal debtor, and himself as surety, his proper remedy was to file a bill to compel *the principal [*42] to pay the debt; whereas, by the course he had taken, he had usurped the remedy of the plaintiffs; for, by the assignment of his mortgages, he became a trustee of Nokes' covenants for the plaintiffs, and had no right to sue upon them without the concurrence of his *cestui que trust*. That the plaintiffs, as mortgagees, had a right to say that their securities should not be interfered with until their debt were paid. And that the circumstances of the aggregate of Nokes' two debts to Seppings being of the same amount as Seppings' debt to the plaintiffs was a mere accident, which could not affect that principle. That, practically, the only effect of prosecuting the action would be to send Nokes to prison, which would damp the sale which the plaintiffs were about to make of his estates, and so prejudice their security.

THE LORD CHANCELLOR—(without calling for a reply.)—The Vice-Chancellor's order is not guarded as it ought to have been.

1846.—*Gurney v. Seppings*.

The Gurneys, as assignees of a debt and mortgage from Nokes to Seppings, have the principal interest in the money to be paid by Nokes ; but, on the other hand, Seppings is responsible to the Gurneys for his own debt, and, as such, has also an interest in the monies to be recovered in the action. If he were a mere naked trustee, and had sold the debt and incurred no personal liability, he could not have dealt with the debt as against the Gurneys. But he is much more in the situation of a surety ; because he is liable for what may not be recovered from Nokes. He is personally liable to the Gurneys for £10,000 ; and for reasons, whether good or bad, but which appear good to him, he thinks it right to sue Nokes upon his covenant. The Gurneys cannot both prevent him from realizing his debt from [*43] Nokes and at the same time hold him liable *for his own debt. It is quite clear that that is the equity between the parties. And if the Gurneys think right, for other reasons, not to let the action go on, they must restore to Seppings his own estate, and release him from his personal liability to them ; on the other hand, they are entitled to prevent the money from getting into the hands of Seppings.

With respect to the point of law on which the Vice-Chancellor is said to have founded his order, it is not necessary for me to give any opinion, except that it is not clear enough to induce me to act upon it as he has done. If the plaintiffs will not take the injunction on the terms I have mentioned, it must be dissolved, but the defendant must give such undertaking as will secure the payment of the money, to be recovered in the action, to the plaintiffs.

The costs below, which I understand have been paid, must be returned.

See the two next cases.

 1846.—*Rigby v. The Great Western Railway Company.*

***RIGBY v. THE GREAT WESTERN RAILWAY COMPANY. [*44]**

1846: July 8.

An application for an injunction to restrain an alleged breach of covenant had been once ordered to stand over until the decision of two legal questions raised by the defendant. On those questions being decided in the plaintiff's favor, and the motion coming on again, the defendant raised a third legal objection, and the court below, at his request, directed a case to be stated for the opinion of a court of law upon it, but, on the ground of the delay in bringing it forward, granted an injunction in the mean time. On appeal, however, the Lord Chancellor dissolved the injunction, notwithstanding that circumstance, on the ground of the much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other might succeed at law.

Where the interference of the court by injunction depends upon a legal right which is disputed, the court ought, for its own security, to put the matter into a course for ascertaining that right; and if that is to be done by sending a case for the opinion of a court at law, this court ought not to leave it to the option of the defendant, but ought itself to direct a case to be prepared, with reference to the Master to settle it, in case the parties differ.

By an indenture, dated the 18th of December, 1841, the Railway Company demised to the plaintiff a piece of land at the Swindon station, and certain buildings which he had already erected thereon upon the faith of a contract by the company to grant him such a lease, to be used as refreshment rooms for the passengers by the railway; and it was, by the indenture, declared "to be the intention of the company, and the understanding of the plaintiff, that, in consideration of the outlay incurred by him in erecting the refreshment rooms, the company should give every facility to the plaintiff for enabling him to obtain an adequate return by means of the rents and profits to be derived from the rooms; and that all trains carrying passengers, not being express trains, or trains sent for express purposes, and except trains not under the control of the company which should pass the station, should, save in cases of emergency or unusual delay arising from accident, stop there for refreshment of passengers for a reasonable period of about ten minutes; and that, as far as the company could influence the same, trains not under their control should be induced to stop there for the like pur-

1846.—*Rigby v. The Great Western Railway Company.*

pose ; and the company engaged not to do any act which should have an effect contrary to the above-mentioned intention.”

[*45] *The indenture also contained a stipulation that, in case the station should, during the continuance of the lease, be discontinued as the regular and general place of stopping for the refreshment of passengers, the company should purchase the buildings from the plaintiff, if such discontinuance should occur within five years, at the actual cost ; and, if after that time, at an amount to be determined by arbitration upon an estimate of the future profits that the plaintiff or his assignees or undertenants would have otherwise derived from the business to be carried on upon the premises.

By another indenture, dated the 24th of December, 1841, the plaintiff, in consideration of £6000, and an annual rent, granted an underlease of the premises to one Griffiths, and after reciting the clause of the former deed relative to the stopping of the trains, the plaintiff covenanted “that he, his executors, administrators, and assigns should and would, at all times during the continuance of the term thereby granted, do all such acts and things as should be necessary and proper for enforcing the fulfilment and performance of the covenants and agreements thereinbefore particularly recited ; and in the said indenture of demise contained on the part of the company, for giving the full benefit and advantage to Griffiths, his executors, administrators, and assigns of the refreshment rooms and premises during the terms thereby granted in the same manner as if he were the assignee of the said costs. And that it should be lawful for Griffiths, his executors, &c., in the name of the plaintiff, to commence and prosecute any action, suit or other proceeding for enforcing those covenants, or for recovering damages for the non-performance thereof, he, Griffiths, his executors, &c. indemnify the plaintiffs, his executors, &c. from and against the costs of such action, &c.”

[*46] *About the beginning of the year 1844, the company having commenced running certain trains, which Griffiths conceived not to be within the exception of the covenant, without stopping at the Swindon station, Griffiths wrote to the plaintiff, informing him that he was losing £5 or £6 a day by

1846.—*Rigby v. The Great Western Railway Company.*

those trains not stopping at the station, and that he thought it necessary to call the plaintiff's attention to the fact, as, if the practice were continued, it would not be worth while carrying on the rooms. In answer, however, to an inquiry from the plaintiff, whether Griffiths would take proceedings against the company on being indemnified, he declined doing so. Under those circumstances the plaintiff instituted this suit against the company and Griffiths, for the purpose of restraining the former from running any trains, other than such as were within the exception in the covenant, without stopping at the Swindon station.

On the first application for the injunction in March, 1844, Vice-Chancellor Wigram ordered that the motion should stand over, and that the plaintiff should bring two actions against the company; in one of which the company were to demur to the declaration for the purpose of raising the question, whether the clause relating to the stopping of trains amounted to a covenant; and to the other the company were to be at liberty to make any other defence they thought fit, consistent with an admission of the deed, they, in the mean time keeping an account.

The plaintiff having succeeded in both these actions, the motion was brought on again before the Vice-Chancellor, when the company, for the first time, insisted that the plaintiff had no right to sue except at the instance of Griffiths, who, it appeared, had never *required him to do so. On the other [*47] hand, it appeared that Griffiths, on being applied to by the plaintiff either to indemnify him against the costs of the suit, or to release him from all liability on his covenants in the underlease, had refused to do either the one or the other. His honor, under these circumstances, granted the injunction, with liberty to the company to take the opinion of a court of law upon a case (which was incorporated in the order) raising the question, whether the plaintiff was under any liability, upon his covenants with Griffiths, for the damage which the latter might sustain from a breach by the company of their covenants in the lease so long as Griffiths did not require him to

Rigby v. The Great Western Railway Company.

take proceedings against the company for the prevention of such breach.

A motion was now made on the part of the company to dissolve the injunction.

Mr. *Stuart*, Mr. *Romilly*, Mr. *Unthank*, and Mr. *Stevens*, for the appeal motion, insisted on the same point that had been taken in the court below, contending that, by executing the underlease of the premises, the plaintiff had divested himself of his right to this injunction against the company, either in his character of lessee or covenantor in the lease, otherwise than with the concurrence and at the instance of Griffiths. That the clause above set forth from the indenture of underlease was to be construed as one entire covenant, and that, according to its true construction, the plaintiff was not liable upon it, unless and until he should be called upon by Griffiths to take proceedings for his protection. That the plaintiff, therefore, was a mere trustee of the covenant in the lease for Griffiths, and as such, could not sue in a court of equity without, at least, the [*48] concurrence of his *cestui que trust*; *James v. Biou*.(a)

They further argued that the covenants in the lease were not such as a court of equity would enforce or consequently prevent the breach of, inasmuch as the same indenture contained covenants on the part of the plaintiff with the company, of which the court could not decree specific performance, as, for instance, covenants to erect additional buildings on the premises; and that a court of equity would only interfere where there was mutuality of remedy, *Gervais v. Edwards*.(b)

Mr. *Wood*, Mr. *Baily*, and Mr. *Fitzherbert*, *contra*, contended that it was too late for the company to raise new legal objections as grounds for postponing the injunction, after the questions at law on which they had originally rested their defence had been decided against them. It was now beyond dispute that they were wrong doers to somebody; for the first action had decided that the clause in the lease, which they had originally contended

(a) 2 S. & St. 600.

(b) 3 Dr. & W. 80.

 1846.—*Rigby v. The Great Western Railway Company.*

was only a declaration of intention, amounted at law to a covenant; and the second action had determined that the trains in question were not within the exception in that covenant. Where was the materiality of either of those questions, if, whichever way they were determined, it was now to be open to the defendants to say, that they were wrong doers, if at all, to Griffiths, and not to the plaintiff, and, therefore, that the plaintiff had no *locus standi* in court? The ground for applying for an injunction was, that the plaintiff was every day sustaining damage which was irreparable, because, from the nature of the case, it was impossible to ascertain its amount. The speediness of the remedy, therefore, was of the very essence of it; and, although that consideration did not in general *in- [*49] duce the court to interfere without giving the defendant an opportunity of establishing any legal defence that he might have in a court of law, it was not unreasonable to require, that he should bring forward all the grounds of that defence at once, in order that the plaintiff might be as little delayed in his injunction as possible.

As to the argument on the want of mutuality, they contended, that the authorities cited had no application; for this was not the case of a contract wholly unexecuted on either side, but that of a contract which had been substantially fulfilled on one side, and which it was the object of the suit to have performed on the other. *Lord Grey de Wilton v. Saxon*, (a) *Rolfe v. Rolfe*. (b)

July 7.—THE LORD CHANCELLOR (without calling for a reply.) It is quite clear, that as far as relates to the plaintiff's interest in the lease, he has no *locus standi*: for the damage complained of by the bill is immediate damage to a business which he is not carrying on. But that is not the ground on which he proceeds: he says, that he is under liability to Griffiths upon his covenant, whether Griffiths requires him to take proceedings or not. That the Vice-Chancellor thought a question of some difficulty, and has accordingly directed a case to be stated upon it for a court of law. It appears that Rigby is now desirous of going on with that case, and after what has occurred, I think it should

(a) 6 Ves. 106.

(b) 10 Jurist. 6. *Vide infr.* p. 62. note.

1846.—*Bigby v. The Great Western Railway Company.*

be proceeded with : for when relief in equity depends upon a legal right, the proper course is first to ascertain what the law is.

[*50] *The only question therefore now is, what is to be done in the mean time—whether the injunction is to be continued, or some other order made to secure the plaintiff against damage from what may be done by the defendants until the legal right is decided :[1] and in dealing with that question the court is bound to consider what means it has of putting the party who may be ultimately successful, in the position in which he would have stood if his legal rights had not been interfered with.

Before I continue the injunction, therefore, I must consider how I can give compensation to the company, in case the court of law should be of opinion, that under the circumstances stated in the case, Griffiths would have no right of action against the plaintiff, and consequently that the latter is under no legal liability. Now I cannot conceive how I can, or how a jury could, ascertain the damage which the company may sustain by being compelled to stop at certain stations. On the other hand, if an action lies, the damage for which the company would be liable to the plaintiff, would be measured by the damages which Griffiths might recover against him upon his covenant ; and whatever difficulty there may be in ascertaining the amount of those damages would be a difficulty in the way of Griffiths and not of Rigby, and Griffiths declines to interfere.

Therefore I think that the order which will most effectually do justice between the parties in the present state of things, will be to dissolve the injunction, the company undertaking to keep an account as directed by the former order, and to pay such sum for violation of their covenant, and to be ascertained in such manner, as this court shall direct. That will relieve the

[*51] case *from the difficulty of ascertaining the damage by a

[1] Where a court upon dissolving an injunction, sees sufficient grounds for doubt, in addition to directing an issue at law, it will sometimes add to its more general directions, that the party against whom the application is made, shall keep an account during the continuance of the injunction, in order that if it shall finally turn out that the plaintiff has a right to the protection which he seeks, amends may be made for the injury occasioned by the resistance to his just demands. See *Eden on Inj.* 188

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jury, for the company will have to pay such damage as the master may approve.

Mr. *Stuart* then said, that if the case sent to law was to be proceeded with, it would require some alteration, as in its present form it omitted some material facts.

Mr. *Wood*, on the other hand, said, that the case was framed by the court after much discussion between the counsel on each side, and that having been directed at the defendant's request, and not objected to at the time, it was too late to object to its terms now.

THE LORD CHANCELLOR.—The regular course of the court, where a case is sent to a court of law, is to refer it to the master to settle it if the parties differ. But here, I see, the case is incorporated in the order. I cannot conceive how that could have been, unless either the parties agreed on its terms, or the court settled it for itself. But I think it is immaterial which of these suppositions is the fact; for where the interference of the court depends upon a legal right, it is the duty of the court itself to put the matter into a proper course for the purpose of ascertaining that right. It ought not to be left to the option of the defendant. The court should do it for its own security. Therefore I now direct that a case shall be prepared, to be settled by the master if the parties differ.

*DIETRICHSEN v. CABBURN.

[*52]

1846: July 17, 20.

The jurisdiction of the court to restrain by injunction an act which the defendant is by contract bound to abstain from, is not confined to cases in which there are either no other executory terms in the contract, or none which a court of equity has not the means of enforcing.

If a bill states a right or title in the plaintiff to the benefit of a negative agreement on the part of the defendant, or of his abstaining from a given act, the court will equally interfere by injunction, whether the right be at law or under an agreement which cannot be otherwise brought under its jurisdiction.

1846.—Dietrichsen v. Cabburn.

THIS was an appeal from an order of the Vice-Chancellor of England, allowing a general demurrer to the bill.

The bill stated that the plaintiff was an extensive vendor of patent medicines, and that, from the extent of his business, he had, at the date of the agreement after mentioned, great facilities by advertisement on his wrappers, &c., of giving publicity to the medicines sold by him. That the defendant having, in 1840, discovered a receipt for a particular medicine called Cabburn's Antidoloric Oil, he applied to the plaintiff to be his wholesale agent for the sale of it, and that thereupon an agreement in writing was entered into between them, dated 1st October, 1840, whereby the defendant agreed for twenty-one years to employ the plaintiff as his wholesale agent for the sale of the oil, and to supply him with such quantities as he should order, at £40 *per cent.* discount upon the current retail price, and that he would not, during that period, supply or sell any of the oil to any other person, for the purpose of selling it again, at a larger discount than £25 *per cent.* upon such retail price. And in consideration of that agreement on the part of the defendant, the plaintiff agreed to continue to act as the wholesale agent of the defendant, and to pay for the oil supplied to him every three months at the price aforesaid.

The bill then stated, that after the plaintiff had incurred considerable expense in advertising the oil, whereby it had [*53] attained great celebrity and an extensive sale, and though he had, in all respects, performed the agreement on his part, the defendant became desirous of evading the performance of it as regarded himself, and had, accordingly, supplied divers medicine dealers in various parts of the country, with large quantities of the oil at a higher rate of discount than £25 *per cent.*

The bill charged that the defendant was a wine and spirit merchant, and that he had not at the date of the agreement, or since, any means of bringing the oil to the notice of the public, except through the agency of some person in the plaintiff's line of business. And it prayed an injunction, and an account of the profits realized by the defendant from the sales already made by him in violation of the agreement.

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Mr. *J. Parker*, and Mr. *Glasse*, for the appellant, said that the Vice-Chancellor in allowing the demurrer, had proceeded upon the doctrine laid down by himself in *Kemble v. Kean*,^(a) *Kimberley v. Jennings*,^(b) and *Baldwin v. The Useful Knowledge Society*,^(c) viz., that where an agreement contained both a positive and a negative term, and the positive term was of such a nature that the court could not compel performance of it, it would not interfere to prevent the violation of the negative term. That, however, was inconsistent with the view of the subject taken by Lord Eldon in *Clarke v. Price*,^(d) where, although the agreement was such that he had no power directly or indirectly to enforce it, he stated, that if the contract had contained a negative or prohibitive term, he would have interfered by injunction as he had done in *Morris v. Colman*,^(e) where Colman having *contracted to write for the Hay- [*54] market Theatre, and for no other, during a certain period, the court granted an injunction to restrain a breach of the negative part of the agreement, with a view of inducing the defendant to perform the positive part, which the court had not otherwise the means of enforcing. They referred also to *Rankin v. Huskisson*,^(f) *Williams v. Williams*,^(g) and *Barrett v. Blagrove*.^(h)

Mr. *Walker* and Mr. *Bacon*, for the respondent, abandoned the ground attributed to the Vice-Chancellor, and admitted the doctrine of *Clarke v. Price* as applied to cases of partnership, contended that it did not apply to other cases, or at all events, to agreements which remained executory on both sides, but only to those which had been fully executed on one side, and which remained executory only on the other; that in this case the court could not compel the plaintiff to act as the defendant's agent, and therefore that it had no jurisdiction to interfere at all; *Hills v. Croll*.⁽ⁱ⁾

They further contended, that in this case, as in all purely

(a) 6 Sim. 333.

(b) *Ibid.*, 340.(c) 9 Sim. 393, but see *Hooper v. Brodrick*, 11 Sim. 47.

(d) 2 Wils. 157.

(e) 18 Ves. 437.

(f) 4 Sim. 13.

(g) 2 Swanst. 253.

(h) 5 Ves. 555.

(i) See a short report of this case, post p. 60.

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executory contracts not under seal, the plaintiff would have no remedy at law for want of a consideration. And although it did not follow, because a party had a remedy at law upon a contract, that he was, therefore, entitled to the more effectual remedy which this court could give by way of specific performance, *Duke of Bedford v. Trustees of the British Museum*,^(a) yet it was an invariable rule, that if the contract were one, upon which, for want of consideration, there would be no remedy at law, this court would not interfere to enforce it.

[*55] *Mr. *Parker*, in reply, observed, that partnerships were cases of executory contracts, and yet it was beyond dispute that this court would, in some of those cases, interfere to keep the parties to their contract so far as an injunction would effect the object, although, from the nature of the case, it could not compel specific performance of the whole contract on both sides. Suits to mills, or sokes, were another instance of the same kind, in which, although the court had no means of compelling the owner of the mill to grind all the corn that was brought there, it was, nevertheless, in the habit of restraining the suitors to the mill from carrying the corn to be ground elsewhere, so long as the owner of the mill was willing to grind it. There was, therefore, no ground for the distinction between contracts in part executed and wholly executory; and even if there were such a distinction, it would not assist the defendant in the present case, inasmuch as this was one of the former class, and not of the latter; for the benefit which the defendant had expected to derive from the contract was already complete, in the publicity given to his medicine through the agency of the plaintiff. And that circumstance was an answer as well to the argument of non-mutuality as to that founded on the alleged want of such consideration as would support an action at law.

July 20.—THE LORD CHANCELLOR.—The agreement, as stated in the bill, imposed upon the plaintiff no other obligation than that of acting as the defendant's agent, and accounting for,

(a) 2 M. & K. 552.

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and paying to him, 60*l.* for every 100*l.* worth of the medicine sold according to the retail price; but upon the defendant it imposed the obligation of so employing the plaintiff, *and of supplying him with all such qualities of the [*56] medicine as he should require, and of not supplying any other person with any of the medicine, for the purpose of resale, at any higher discount than 25*l.* per cent., the plaintiff's discount being 40*l.* per cent.

The bill alleges that the plaintiff had regularly performed his part of the agreement, but that the defendant had not performed his part, but had supplied other persons, for the purpose of resale, with the medicine at a larger discount than 25*l.* per cent. It then prays an account of the quantities so supplied to others, and payment of the profits made, and an injunction against such violation of the contract for the future. And the question is, does the bill state a case coming within the jurisdiction of the court? The allowance of the demurrer assumes that it does not; and the ground stated, (for I have not had the benefit of seeing a note of the Vice-Chancellor's judgment,) is, that the court will not prohibit the violation of a negative term in an agreement, unless it has the power of enforcing the positive part of the same agreement.

I cannot but think, that there has been some misapprehension of the meaning of the Vice-Chancellor, as applied to this supposed rule: for in the case of *Kimberley v. Jennings*,^(a) his honor, in stating that a violation of a negative term in an agreement will not be restrained in cases in which the positive part of the agreement cannot be enforced, exemplifies it by saying, that, if the agreement cannot be performed in the whole, the court cannot perform any part of it. To the proposition so explained,^(b) I entirely assent; for it is only applying *a well known rule in cases of specific performance, of [*57] which an injunction is in many cases the instrument, and amounts only to this, that if there be such an infirmity in the agreement, that it cannot be performed in all its parts, the court

(a) 6 Sim. 340.

(b) The Lord Chancellor, it is conceived, is here referring to an agreement which is not mutual.

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will not by an injunction compel the defendant to perform his part of it:[1] and this view of his honor's opinion is confirmed by the case he put, of a consideration actually paid for a negative agreement, in which case he says that an injunction would be granted. I cannot see any difference between a consideration actually paid, and a performance alleged by the plaintiff of all that he had undertaken to do.

The equitable jurisdiction to restrain by injunction an act which the defendant by contract or duty was bound to abstain from, cannot be confined to cases in which the court has jurisdiction over the acts of the plaintiff; for if that were so, it could not interfere to restrain the violation of contracts by tenants, or of duty by agents, as in the case of *Yovatt v. Winyard*,(a) and *Green v. Folgham*,(b) or by an attorney, as in *Cholmondeley v. Clinton*,(c) in none of which cases was there anything to be done by the plaintiff which equity could enforce. Such, also, are cases of injunctions sought by tenants against their landlords, as *Rankin v. Huskisson*,(d) where there was a negative agreement, and *Squire v. Campbell*,(e) where one was attempted to be raised by the exhibition of a plan. In none of these was there any equity to be administered against the plaintiffs, and yet the jurisdiction was assumed: for although in the latter case the injunction was dissolved, that was because I thought no equity was raised by the alleged *exhibition of plans, which I was of opinion could not be used for that purpose. The objection now suggested was not raised, or certainly was not the ground of the decision.

Similar to these are cases of injunction to protect legal rights, as patents, copyrights, services to mills and others. There is no branch of the equitable jurisdiction requiring more discretion in the exercise of it, but certainly none more beneficial, than that of injunction; and I think that the doctrine contended for by the respondent would tend greatly to limit its sphere of action,

(a) 1 J. & W. 394.

(b) 1 Sim. & St. 398.

(c) 19 Ves. 261.

(d) 4 Sim. 13.

(e) 1 My. & Cr. 559.

[1] See *Kemble v. Kean*, 6 Sim. 333; *Hemlin v. Dineford*, 2 Edw. Ch. R. 529; *De Rincasoli v. Orvetti*, 4 Paige Ch. R. 264; *Sanguis v. Benedetti*, 1 Barb. Sup. C. R. 315.

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and deprive many of the benefit of it, whose interests require it as much as others.

If the bill states a right or title in the plaintiff to the benefit of the negative agreement of the defendant, or of his abstaining from the contemplated act, it is not, as I conceive, material whether the right be at law or under an agreement which cannot be otherwise brought under the jurisdiction of a court of equity. In *Martin v. Nutkin*,^(a) an injunction was granted to restrain the ringing of a church bell, the plaintiff having put a clock in the church in consideration that the bell should not be rung at five in the morning. In *Barratt v. Blagrove*,^(b) the proprietor of Vauxhall Gardens obtained an injunction to restrain the lessee of a public-house in the neighbourhood from selling liquors during the time the gardens were open, in violation of his covenant; and, although the injunction was dissolved,^(c) upon the ground of acquiescence, no objection was made to the exercise of the jurisdiction for want of mutuality.

*But I consider the doctrine promulgated by Lord Eldon in *Morris v. Colman*,^(d) and in *Clarke v. Price*,^(e) as conclusive upon this point. In the former case the defendant was restrained from writing for any other but the Haymarket Theatre, he having entered into an agreement to that effect; but in *Clarke v. Price*, there was not any such negative agreement, and that Lord Eldon states to be the ground of his refusing to interfere: if there had been, there cannot be a doubt that he would have granted the injunction. It has been said that *Morris v. Colman* was a case of partnership: Lord Eldon does not appear from the report to have proceeded upon any such ground. The present and other cases of the kind are in the nature of partnership, being a joint undertaking for the benefit of the plaintiff and the defendant; and it does not appear why cases of actual partnership should be more favored, in the exercise of the jurisdiction by injunction, than others.

It being clear that the court will interfere to restrain a departure from the contract of partnership, cases of partnership afford additional instances of the fact that the court is not con-

^(a) 2 P. W. 266.

^(b) 5 Ves. 555.

^(c) 6 Ves. 104.

^(d) 18 Ves. 437.

^(e) 2 Wils. 157.

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finer to cases in which it has jurisdiction over the whole contract, the interposition of the court in cases of continuing partnership having been in many cases considered as very limited.

Looking, therefore, to the whole range of cases in which the court interferes to prevent the breach of a negative agreement, I cannot find any ground for the argument contended for by the respondent: and seeing that the bill alleges sufficient to show that the plaintiff is entitled to the benefit of the negative agreement on the part of the defendant, and that the defendant [*60] has violated that agreement, and will, if not restrained, continue to do so, I am of opinion, that a case is stated for the interposition of a court of equity, and that the demurrer ought to be overruled.[1]

HILLS v. CROLL.

Jan., Feb., July, 1845.

The defendant being the patentee of certain inventions for manufacturing and purifying gas, an agreement was entered into on the 22d of March, 1841, between him and the plaintiff, whereby, in consideration of £200 paid by the plaintiff to the defendant, it was agreed that the defendant should, for the term of fourteen years, purchase of the plaintiff and of no other person, without the plaintiff's consent in writing, all the acids that he should require for the manufacture of muriate or sulphate of ammonia, paying for the same according to the regular course of trade, at the average price of the day, to be ascertained as therein mentioned; and that he should during the same period, sell to the plaintiff (unless the plaintiff should refuse to purchase the same) all the muriate or sulphate of ammonia which he should manufacture by his said patent processes at the average price of the day, to be ascertained as therein mentioned. Then followed an express covenant on the part of the plaintiff to deliver to the defendant all the acids he might require for his said

[1] See *post*, page 64, note 1.

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manufacture, he paying the plaintiff for the same at the average price of the day, to be ascertained as aforesaid, and to pay the defendant for the said muriate and sulphate of ammonia at the rates aforesaid; and a like covenant on the part of the defendant that he would "not during the said term use in [*61] his manufacture, or purchase of any other persons to be used therein, any acid except acid to be purchased of the plaintiff, without his consent in writing.

After this agreement had been acted on for a considerable time, the defendant refused to abide by it any longer, and proceeded to purchase acids for his manufacture from other persons than the plaintiff: whereupon this bill was filed praying a specific performance of the agreement, and an injunction to restrain the defendant from purchasing acids elsewhere than from the plaintiff.

A motion for an injunction having been refused by the Vice-Chancellor of England, it was renewed by way of appeal before the Lord Chancellor (Lyndhurst.)

Mr. Wakefield, Mr. J. Parker, and Mr. Torriano appeared for the plaintiff.

Mr. Bethell, Mr. Romilly, and Mr. Welford for the defendant.

All the authorities cited in *Dietrichsen v. Cabburn* were referred to in the argument.

July.—THE LORD CHANCELLOR, in giving judgment, said:—There is a stipulation on the part of Hills, that he will supply the acids, and there is a stipulation on the part of Croll, that he will purchase acids from Hills and from no other person. Has the court any power to compel Hills to fulfil his part of the agreement? Can the court order him to continue the "manufacture of acids, or to purchase them elsewhere, [*62] for the purpose of supplying the defendant? It is clear, I apprehend, that the court has no such power. In the case of *Colman v. Morris*, Mr. Colman was restrained from writing for

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any other theatre, the court inferring that that would compel him, or have a tendency to compel him, to write for the Haymarket Theatre : but in this case, the court has no power to compel the plaintiff to supply the defendant with acids, by ordering him not to supply any other person : that is not the agreement, nor was it ever intended that it should be the agreement : therefore it is clear, that the court cannot either directly or indirectly compel him to perform his part of the agreement. And it has been laid down again and again, and very recently in a case before Sir Edward Sugden in Ireland,^(a) that unless the court can decree specific performance of the whole of a contract, it will not interfere to enforce any part of it. When, therefore, this cause comes to a hearing, the court will not have jurisdiction to restrain the defendant from purchasing acids elsewhere, because it will not be able to compel the plaintiff to furnish all the acids that may be necessary for the manufacture carried on by the defendant. If it cannot do this at the hearing, it follows of course that it will not do it in the mean time upon an interlocutory application. The decision of the Vice-Chancellor must therefore be affirmed.^(b)

(a) *Gervais v. Edwards*, 2 Dr. & W. 80.

(b) The following observations on this case are suggested by that of *Dietrichsen v. Cabburn*, (*supra*, p. 52.)

Considering the sum of money actually paid by the plaintiff at the time of the agreement, and that, for any thing that appeared to the contrary, his acids were of the ordinary kind, and that the defendant was to purchase them at the ordinary price of the day, there seems to have been some ground for contending, (though it is believed that the point was not taken,) that the *contract amounted to nothing more than a purchase by the plaintiff, for the sum of £300, of the exclusive right of supplying the defendant with acids for his manufacture, and buying of him in return all the ammonia which should be manufactured therefrom, during the term of his patent right, without involving any reciprocal obligation on the part of the plaintiff to continue such course of dealing longer than it suited him to do so.

If such a construction of the contract be admissible, there is of course an end of the argument of non-mutuality. But even supposing that the obligation of the contract was reciprocal, the court appears to have overlooked the distinction between contracts which remain wholly executory, and those which have been executed or acted on to such an extent as to give to one of the parties an equity arising from part performance of the contract, to insist upon an adherence to its terms by the other.

So long as a contract, which is not mutual in point of remedy, rests merely in covenant, the maxim that the court will not enforce a part of an agreement where it

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cannot compel performance of the whole—in other words, will not give one-sided relief—is undoubtedly true, and applies, it is conceived, as much to the jurisdiction by way of injunction as to that by specific performance; for where the court does interpose by injunction to restrain the violation of a negative term in a contract, it is, in many cases, avowedly done with a view of thereby inducing the defendant to perform some other term which the court has no direct means of enforcing. But it seems perfectly consistent with this, that when such a contract has been executed or acted upon so far as to have altered the relation between the parties, and to have given to one of them an equity arising out of those dealings, as distinguished from his original right under the contract itself, the court will, notwithstanding the original non-mutuality of the contract, give effect to that equity either directly by a decree for specific performance, or partially and indirectly by an injunction, according as the nature of the case may admit of the more or less complete measure of relief.[1]

Whether the dealings which may have taken place under a contract not originally mutual in its nature, have or have not given to the plaintiff such an equity, and whether, supposing that they have, the jurisdiction of the court can in other respects be safely and properly exercised, is a question of discretion which must be determined by the particular circumstances of each case. And the two preceding cases are authorities, among others, to show that the mere circumstance of a portion of what the plaintiff may have agreed to do remaining executory, and being of such a nature that this court has no means of enforcing it, will not prevent the court [*64] from interfering in his behalf, if he appear to have so far performed the contract on his part as to render it inequitable for the defendant to withdraw from it. Whether such was or was not the case in *Hills v. Croll*, the writer of these remarks does not presume to offer an opinion; but that the question was one which deserved consideration can hardly be doubted. And it is because that question, and the exercise of discretion connected with it, appear to have been excluded by the view which the court took of the case, that the decision, whether right or wrong in the result, cannot furnish any guide in other cases of a similar kind; and on that account it was not reported until the citation of it in the case of *Dietrichsen v. Cabburn*, rendered some notice of it necessary.—*Notes by the Reporter*.

[1] That the court may by injunction enforce negative covenants, see *Barrow v. Richard*, 8 Paige, 351; *Seymour v. McDonald*, 4 Sandf. Ch. R. 502; *Steward v. Winter*, 4 Seyre, 4; *Ibid.* 587; *Hills v. Miller*, 3 Paige, 254.

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ATTORNEY GENERAL v. MALKIN.

1846: July 18, 22; Nov. 14.

A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such person or persons as one of them, who was a married woman, should by will appoint, and in default of such appointment, "To and for the benefit of her executors or administrators." The lady died without any appointment. *Held*, that her personal representative took the reversionary interest in the fund, not beneficially, nor in trust for her next of kin, but as part of her estate.

THOMAS BRAND, by his will, bequeathed the sum of 12,000*l.* to trustees, in trust for his wife for her life, and after her death to Addison Carr and his wife (who was the testator's daughter) for their joint lives and the life of the survivor; and after the death of the survivor, for such person or persons as Mrs. Carr should by will appoint; and in default of appointment, "to and for the benefit of her executors or administrators."

Mrs. Carr died without having made any appointment, leaving her husband surviving. He died in August 1838, without having taken out administration to his wife's estate.

[*65] By his will he gave all his property to "the defendant, Mrs. Malkin (his only daughter,) and appointed her and her husband his executors, who accordingly proved his will.

On the death of Mrs. Brand, the testator's widow and first tenant for life of the fund, in 1841, Mrs. Malkin took out administration to her mother's estate, and claimed the legacy; whereupon the question arose, which this information was filed to determine, what probate and legacy duties were payable, it being contended by Mrs. Malkin that under the limitation "to and for the benefit of the executors or administrators" of her mother Mrs. Carr, she (the defendant) was entitled to the fund, either as sole next of kin of her mother or, by personal designation, as her administratrix; and therefore that only one probate duty and one legacy duty were payable: while, on the other hand, it was contended on the part of the crown that, under that limitation, the reversionary interest in the fund became part of Mrs. Carr's estate at her death, and that Mrs. Malkin's bene-

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ficial title to it was derived from the will of her father, and consequently that it was liable to two probate and two legacy duties.

The cause was heard, by special leave, before the Lord Chancellor.

Mr. *Romilly* and Mr. *Maule*, for the Attorney-General, relied on *Daniel v. Dudley*,^(a)

Mr. *Tinney* and Mr. *Gardner*, for the defendants, cited *Sanders v. Franks*,^(b) *Wallis v. Taylor*,^(c) *Bulmer v. Jay*,^(d) *Smith v. Dudley*,^(e)

*THE LORD CHANCELLOR.—The gift under Thomas [66] Brand's will, subject to a life estate to his widow and to life estate to Mr. and Mrs. Carr and the survivor, with power of appointment to Mrs. Carr, which was not executed, was in trust to pay and apply the funds in question unto and for the benefit of the executors or administrators of Mr. Carr. Mrs. Carr died first, then Mr. Carr; and after the death of both, the testator's widow, who was entitled for life, died; and the question is, whether these funds were part of the estate of Mr. Carr, that is, whether they were part of the estate of Mrs. Carr; for although they were a reversionary interest which never could fall into possession during the coverture, yet, as the husband survived, he became entitled to such reversionary interest if it formed part of his wife's estate.

Does, then, a gift to the executors or administrators of one of several tenants for life of a fund constitute part of the estate of such tenant for life, or is it a gift in trust for the next of kin of such person? It seems strange that this should be made a question. The title of the tenant for life was admitted and assumed in *Saberton v. Skeels*,^(f) and *Walton v. Makin*,^(g) It was precisely the case I had to consider in *Daniel v. Dudley*,^(h) and although there was not a formal decision of the point, I formed and expressed a very decided opinion in the affirmative of the

(a) 1 Phil. 1.

(b) 2 Madd. 147.

(c) 8 Sim. 241.

(d) 4 Sim. 48. and My. & K. 197.

(e) 9 Sim. 125.

(f) 1 Russ. & M. 587.

(g) 6 Sim. 148.

(h) 1 Phil. 1.

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proposition. The Vice-Chancellor had in that case decided that the next of kin of the wife were entitled, founding that opinion upon what he conceived to be a clear manifestation of intention to exclude the husband,—a circumstance most material [*67] if there had been expressions from *which a gift to the next of kin of the wife could have been supported. Resting as the decision does upon this ground, it is no authority in support of the affirmative of the general proposition. Upon the same principle the Vice-Chancellor, in *Smith v. Dudley*,^(a) held that an ultimate trust of the wife's property for the executors or administrators of the wife, of her own family, was a gift to her next of kin; but in that case his honor held that an ultimate trust of the husband's property to his executors or administrators, of his own family, gave him the absolute property. So far, therefore, from that case being an authority for the affirmative of the general proposition, it decided that the addition of the words "of his own family" did not prevent the gift to the executors or administrators of the husband taking effect as a gift to himself. In *Bulmer v. Jay*,^(b) both the learned judges who decided that case, but particularly Lord Brougham, founded their opinion upon particular terms and provisions of the settlement, as controlling the ordinary and natural meaning of the words. In *Daniel v. Dudley*, *Graftey v. Humpage*,^(c) was cited as favorable to the claim of the next of kin; but so far as it is applicable at all to the present question, it is an authority against it. The decision of the Master of the Rolls assumed that the reservation, after a life estate to the wife, to her executors, administrators, and assigns, gave the property to her surviving husband, but that it was controlled by the husband's covenant to settle all the wife's property for the benefit of her next of kin.

It appears, then, that in all the cases in which the next [*68] of kin have been held entitled, the decision has *proceeded upon a supposed intention derived from peculiar terms and provisions of the instrument controlling the admitted ordinary and legal meaning of the words used. Whether, in all these cases, there was sufficient evidence of such intention, is

(a) 9 Sim. 125.

(b) 4 Sim. 48, and 3 Myl. & K. 197.

(c) 1 Bosc. 46.

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immaterial for the present purpose, for all the cases assume that without evidence of such intention the next of kin would not be entitled.

I cannot, however, abstain from observing that such evidence ought to be very strong to justify a construction inconsistent with the ordinary and legal meaning of the words used. That such cases may exist cannot be doubted, for the words being only the media through which the meaning is conveyed, it is immaterial what words are used if we are sufficiently informed what meaning they are intended to bear; but the actual probability, that the author of the instrument intended that the words used should be understood according to their ordinary and legal meaning, is so strong, that slight circumstances cannot be considered as sufficient evidence of a contrary intention. Too easy a departure from the ordinary meaning leads to uncertainty, and tends to make every case the subject of unsatisfactory speculation as to the author's intention.

In the present case, the testator might have had one of three objects: first, to give it to the executors or administrators of Mrs. Carr for their own use and benefit,[1] or, secondly, in trust for his next of kin, or, thirdly, to Mrs. Carr herself, or rather to throw it into her estate. The first is the most improbable, the second not much less so; and if that had been his intention, would he have taken this method of effecting his purpose? But if, as appears to have been the fact, Mrs. Carr was the object of his bounty, what can be more natural than that, after providing for the life estate and giving to Mrs. Carr all [*69] the powers over the fund necessary to secure the enjoyment of property by a married woman, he should give to her all that might not be exhausted by those other provisions.

[1] On the subject of executors taking beneficially, see *Willman v. Bowring*, 2 Russell, 374; S. C. 1 Sim. & St. 24; 3 Sim. 328; *Collier v. Square*, 3 Russell, 467; *Dawson v. Thorne*, Ibid. 235; *Braddon v. Farrard*, 4 Russell, 87; *Paylin v. Hills*, 1 Mylne & K 470; *Ellis v. Selby*, 1 Mylne & Cr. 296; *Wood v. Cox*, 2 Mylne & Cr. 684; *Daniels v. Dudley*, 1 Phillips, 6; *Stocks v. Dodsley*, 1 Keene, 325; *Haines v. Haines*, 2 Keene, 646; *Cotton v. Cotton*, 2 Beavan, 67; *Hillaway v. Clarkson*, 2 Harc. 524; *Johnson v. Johnson*, 3 Hare, 164; *Morris v. Haves*, 4 Hare, 599, 606; *Drake v. Pell*, 3 Edw. Ch. R. 270; *Brewster v. Striker*, 2 Comst. 19; *Leggett v. Perkins*, 2 Comst. 297.

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The construction, therefore, which I put upon this instrument preserves the ordinary legal meaning of the words used, is in accordance with the great weight of authority, and is most consistent with the apparent and probable intention of the testator. I am of opinion that the husband became entitled to this reversionary interest *jure mariti*, and that the probate and legacy duties are payable upon it as part of his estate.

 IN RE PENDER.[1]

1846: Nov. 2, 3, 4.

The provisions of the 37th clause of the 6 & 7 Vict. c. 73, for the authentication by signature of a solicitor's bill of costs, are intended for the protection of the client only, and therefore where a bill has been delivered without such authentication, that circumstance is no objection to an application by the client for its taxation.

The decision in *Ex parte Gaitskell*, in which it was held, that applications for the taxation of bills, in the second class of cases provided for by the thirty-seventh section of the statute, do not require notice, confirmed.

THIS case came before the court upon an appeal petition and an appeal motion.

The appeal petition sought to discharge an order of the Master of the Rolls, obtained upon a special petition, presented, with notice, by Jane Glasson, as administratrix, with the will annexed, of her father William Glasson, for the taxation of four bills of costs which had been delivered by Messrs. P. and G. after the death of William Glasson, for business done by them as his solicitors in a certain suit in this court, and in other matters.

[*70] *The appeal motion sought to discharge an *ex parte* order of the Master of the Rolls, made upon an application by the same Jane Glasson for the taxation of three other bills which had been delivered to her by Messrs. P. and G. for business of the like kind done for her personally subsequently to the death of her father.

[1] 8 Beavan, 299.

1846.—In re Pender.

The circumstances relating to the four bills were these :— William Glasson having died in March 1843, the bills were, in the month of July following, delivered to his widow, who was named one of the executors in his will, but who afterwards, together with the other executors, renounced probate. On the 10th of March 1844, Jane Glasson obtained letters of administration to her father's estate : the bills were then in her possession, having been handed to her by her mother at her request in the previous month of February. Various sums were from time to time paid on account of them to Messrs. P. and G. by different members of the family, and some by Jane Glasson after she obtained the letters of administration. On the 16th of November 1844, she obtained an order *ex parte* for the taxation of these bills ; but soon after, being advised that that order was irregular, she abandoned it, and, in the month of February 1845, she presented a special petition, which came on to be heard on the 10th of April following, when the order above mentioned was made. In the meantime, Messrs. P. and G., on being served with the first order, had sued out a writ in an action against her for the amount of the bills, but which action they did not further prosecute.

The three other bills were delivered to Jane Glasson personally in November, 1844, and the order made for their taxation, which was dated the 10th of February, 1845, directed that, on payment of what should be *found due in respect of them, Messrs. P. and G. should deliver up all papers &c. in their hands belonging to her. [71]

None of either set of bills were signed Messrs P. and G., or accompanied by any letter referring to them so signed ; and Messrs. P. and G. now stated on affidavit that the bills had not been delivered with any view to taxation, but with a view to their being settled amicably.

Mr. *J. Parker* and Mr. *James* appeared for the Appellants.

Mr. *Roupell* and Mr. *Goodeve*, for the Respondent.

The principal point insisted on by the appellants was, that

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the bills, not being authenticated by signature, in the manner required by the stat. 6 & 7 Vict. c. 73, were not taxable; it being contended that the words "such bill" in the thirty-seventh and subsequent clauses must according to their grammatical construction, be taken to mean a bill so authenticated, the sentence immediately preceding that in which the words first occurred having provided that the bill should be signed by the solicitor or accompanied by a letter referring to it which was so signed; and that it was impossible to hold, as the Master of the Rolls had done, that an unsigned bill was taxable at the instance of the client, without also holding that such authentication was immaterial for the purpose of the remedies given by the statute to the solicitor, which would be contrary to the imperative requisition of the thirty-seventh clause, that, for that purpose at least, the bill should be so authenticated; [*72] and the cases of *Doe v. Roe*,^(a) *Gerard v. Arnold*,^(b) and *Peters v. Sheehan*,^(c) were cited as showing that signature had always been considered essential to make a bill taxable under the stat. 2 G. 2. c. 23, which being in *pari materia* with the present, the two statutes ought to receive a similar construction.

On the other side it was stated that it had been ascertained by inquiry at the rolls that, upon applications under that statute in this court, the signature of the bill had never been considered material, and that the authorities above referred to did not prove a different practice to have prevailed in courts of common law, but that *Biggs v. Maxwell*,^(d) rather implied the contrary. It was further argued that the construction contended for, by the appellants, of the words, "such bill" in the thirty-seventh clause of the present statute was irreconcilable with several of the subsequent sections—38th, 39th, 40th and 41st,—in which, although the same term was used, it was evident that the bill referred to was not necessarily a signed bill, *In re Downes*:^(e) and that the provision requiring the authentication of a bill by the signature of the attorney was introduced solely for the protec-

(a) 4 Dowl. 95.

(b) 6 Dowl. 336.

(c) 10 Mees. & Wels. 213.

(d) 3 Dowl. 497.

(e) 5 Beav. 495.

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tion of the client, and might consequently be waived, as it had been here.

Another objection to the order of the 10th of April, 1845, was that there had been no delivery to Jane Glasson of the bills therein referred to, or at least no delivery within twelve months previous to the application for their taxation, and consequently that the case was one of the third class provided for by the thirty-seventh clause, in which special circumstances were to "be shown as the foundation of the order, which had [*73] not been done here. But upon that

THE LORD CHANCELLOR observed that it was difficult for the appellants to contend that there had been no delivery of those bills to Jane Glasson, after they had actually commenced an action against her upon them; and that, if delivered to her at all, they must be taken to have been delivered after she obtained administration, because, until that time, she was not the party chargeable therewith, nor capable of making any application for their taxation.

With respect to the order of the 10th of February, 1845, for the taxation of the three bills (which was throughout the argument treated by the appellants as an order made under the statute,) it was insisted, in addition to the objection for want of signature, that, being made more than a month after the bills had been delivered, it fell within the second class of cases provided for by the thirty-seventh section, and that in cases of that class the order for taxation was not an order of course, but one requiring notice; and it was contended that the decision of Lord Lyndhurst on that point in *Ex parte Gaitskell*,^(a) was erroneous. But

THE LORD CHANCELLOR, after referring it to the grounds of that decision as reported, expressed his concurrence in it, and the point was not further pressed.

A further objection taken by the appellants to the order of the

(a) 1 Phil. 576.

1846.—In re Pender.

10th of February, 1845, was, that it directed the appellants, on payment of the amount of their bills when taxed, to deliver up *all* the documents "in their custody belonging to Jane Glasson, which they observed would embrace documents belonging to her as administratrix of her father, and on which there would be a lien for the amount of the other four bills: and that the circumstance, that the language of the common order,^(a) was inapplicable to a case in which the party applying filled two characters, showed that such a case required a special application.

Nov. 4th.—THE LORD CHANCELLOR, in giving judgment, expressed himself to the following effect:—

I have looked at the act in this case, and at the authorities which have been referred to. The cases cited have very little application, and therefore it is necessary to consider the question upon the construction of the act.

Two constructions have been suggested; one is, that the provisions as to signature are to be considered as included in the term "such bill," wherever it occurs; the other is, that those provisions are to be considered as distinct from the rest of the enactment, and that where a bill is mentioned again, it means a bill without reference to whether it is signed or not. The question is, whether a bill delivered unsigned is or is not taxable.

In this, as in all other cases where an act is susceptible of two constructions, if there already exists a practice founded on a particular construction, that is a strong inducement to the court to come to a conclusion conformable to that practice. Another *consideration which the court will also attend to, is the result which the one construction or the other is likely to produce. Now, as to the first of these considerations, I have been informed by the officer at the rolls whose duty it is to attend to orders of this kind, that it has not hitherto been considered material, on applications by a client for the taxation of a bill, whether the bill has been signed or not. And with respect to the second, there is an obvious reason for requiring that

(a) *Satan. Decr.* p. 333.

1846.—In re Fender.

a bill should be signed, as a protection to the client against the solicitor, in order that there may be no doubt as to the nature and extent of the demand: but I cannot conceive what benefit could arise from requiring that it should be signed for the purpose of taxation at the instance of the client: on the contrary, such a construction of the act might, as the Master of the Rolls observed in his judgment, lead to great malpractices. For the solicitor is by the act subjected to this penalty, that if he delivers a bill too large by one-sixth of its amount, he pays the costs of the taxation; and it is obvious, that it would open the door to very improper practices if the solicitor, having informed the client of the amount and particulars of his demand by the delivery of an unsigned bill, should, when the client applies to have it taxed, be allowed to protect himself from that penalty, by saying that the bill was not signed. There is, therefore, a very sufficient reason why the court should require a bill to be signed before the solicitor can take any proceedings upon it, but no reason, why a bill should go for nothing when the client comes for taxation, merely because it is not signed.

These considerations would have great weight with me in determining the construction of the act if its terms were ambiguous, but, after looking through its provisions, I cannot see that there is any ambiguity in them, and I think [*76] that, upon the language of the act itself, the construction of the Master of the Rolls is the correct construction.

The question is, whether the words "such bill" (for all turns upon the construction of these words,) means a bill containing the demand, or a bill containing the demand, *and signed*. Now the clause provides, "that no attorney or solicitor shall commence any action or suit for the recovery of any fees &c. until the expiration of one month after he shall have delivered to the party to be charged therewith a bill of such fees, &c., and which bill shall be either subscribed with the proper hand of such attorney or solicitor, or be enclosed in, or accompanied by, a letter subscribed in like manner referring to such bill." It provides, therefore, for two modes of authentication: the solicitor may either sign the bill, or accompany it with a letter signed. And then it proceeds—"and upon the application of the party chargeable by such bill within such

1846.—In re Pender.

month, it shall be lawful for, &c., [the several courts therein mentioned,] and they are hereby required to refer such bill, &c." Here, then, is a provision referring to a bill which on the face of it may not be signed; and therefore "such bill" cannot mean necessarily a bill signed, for such a construction of the words would exclude from all the provisions where they occur the case of a bill not signed on the face of it, but only contained in, or accompanied by, a letter. It is clear, that where two modes of delivery are prescribed, in one of which the bill would contain on the face of it the signature of the attorney, and in the other not, you must adopt the construction of "such bill," which will include both.

[*77] "I have looked at the other sections that were referred to, but, while they are quite consistent with this construction, they do not appear to me to carry the argument further. It is quite sufficient, however, for me to see that in this first passage where the words are used, they so clearly warrant the construction which I have put upon them.

This question only applies to the four bills for business done for the testator during his lifetime; for the other three bills were taxable under the ordinary jurisdiction of the court. The case in Meeson and Welsby settles that beyond all doubt. And that also disposes of the point raised at the bar as to the time of the delivery of the latter bills. It was contended indeed as to them, on the assumption that the order for their taxation was an order made under the statute, that the case was one of the second class provided for by the thirty-seventh section, and that in such case the court had no jurisdiction to make an *ex parte* order. I disposed of that point during the argument, and I only advert to it now as bearing upon another part of the case. [His Lordship then read that part of the thirty-seventh clause and proceeded.]

During the month then the court has no discretion upon the matter; the order is an order of course, a simple order for taxation of the bill; but after the expiration of the month, the provision is no longer peremptory, but a duty is imposed upon the court to qualify its order according to the circumstances stated upon the petition, and to impose such terms as may appear ne-

1846.—In re Pender.

cessary to do justice between the parties. That discretionary power is not inconsistent with a jurisdiction *to [*78] make an *ex parte* order, but it is an answer to the argument so much pressed at the bar, that the provisions as to signature, if held to be essential for the remedies given to the solicitor, must be equally so for the remedies given to the client : for there is nothing to prevent the court, in the exercise of this discretionary power, from requiring of the solicitor an observance of this provision, when he comes himself for taxation of his bill, as one of the terms of granting his application ; and this, it appears, is what the Master of the Rolls, in the forms of order which he has prepared for such cases, has done. But, for the reason to which I have before adverted, there is no necessity for imposing such a restriction in the case of the client. He has merely the bill, informing him of what the solicitor's demand is, and all he wants is the taxation of it, in order that he may know how much of it he is bound to pay.

The only other objection to the orders applied to the three bills, as to which it was said, that the order was too extensive in requiring the delivery of all papers, without distinction, which the solicitor held, belonging to the petitioner ; but I cannot recognize any such objection. There are the bills relating to the affairs of the testator, and the bills relating to the affairs of the petitioner personally. Both are to be taxed, and one or other embrace all the transactions between the parties ; all the bills being paid, all the papers must be delivered up. It is said that only part of the papers belong to the petitioner in her own right ; but there is no evidence of that, and I cannot treat the order as irregular upon a mere suggestion that by possibility it may be so. If the solicitor is asked to deliver up any papers under that order which he thinks he has a right to retain, he may apply to the court.

*This disposes of all the objections that were made to [*79] these orders, and the result is, that both the petition and the motion must be refused with costs.

 1846.—*Heming v. Swinnerton*.

HEMING v. SWINNERTON.[1]

1846: Nov. 6.

The Court of Chancery is one of the "Courts of Record" to which the stat. 9 & 10 W. 3, c. 15, gives summary jurisdiction for the enforcement of awards.

The stat. excludes every jurisdiction to interfere with the execution of awards made under it, except the summary jurisdiction expressly given by it. And a bill will not lie to impeach an award made under the stat. whether the submission under which it was made has or has not been made a rule or order of court before bill filed.

THERE being a suit pending in this court between the plaintiff and defendant, they entered into an agreement, out of court, to refer all matters in difference between them in that suit to arbitration; and it was one of the terms of the agreement, that the reference, and the award to be made in pursuance of it, might, at the instance of either party, be made an order of this court.

After the award was delivered out, but before the submission had been made an order of the court, this bill was filed, alleging various defects in the award, and praying that it might be set aside, and that the defendant might be restrained by injunction from proceeding to make the submission an order of the court.

To that bill the defendant put in a general demurrer, for want of equity which the Vice-Chancellor of England, on argument, overruled.

This was an appeal from that decision.

Mr. *J. Parker* and Mr. *Daniel*, for the appeal, stated, that the Vice-Chancellor's judgment was founded on the circumstance of the submission not having been made an order of court [*80] before the bill was filed; but that *when the reference was under the statute, which they contended this was, *Nichols v. Chalie*,^(a) *Gwinnett v. Bannister*,^(b) that circumstance had by Sir J. Leach been, on two occasions, *Davis v. Getty*,^(c) and *Dawson v. Sadler*,^(d) decided to be insufficient to

[1] 14 Sim. 588.

(a) 14 Ves. 263.

(b) *Ib.* 53.

(c) 1 S. & St. 411.

(d) *Ib.* 537.

 1846.—*Heming v. Swinnerton*.

give this court a jurisdiction, which was expressly ousted, by the stat. 9 & 10 W. 3. c. 15.; and that the only exception to the uniform current of authority upon that point was the decision of the Vice-Chancellor himself in *Nichols v. Roe*,^(a) but which had been reversed upon appeal by Lord Brougham.^(b)

Mr. *Rolt* and Mr. *Wright*, for the respondent, contended that the "Courts of Record," to which alone the statutory jurisdiction was given, did not include the Court of Chancery, and, therefore, that this case was not within the statute; in support of which they referred to *Miles v. Presland*,^(c) in which it was held, that this court was not one of the Superior Courts at Westminster within the meaning of the 1 & 2 Vict. c. 110, s. 13, and they submitted, that, whatever inference might be drawn to the contrary from the second section of the statute, was not sufficient to supply the want of an express grant of the jurisdiction in the first.

[THE LORD-CHANCELLOR.—I do not see how the provision of the second section is to be explained according to the respondent's construction of the first. It is not safe always to rely on one's general impressions, but it is certainly quite a new proposition to me, that this court has not jurisdiction to make orders under the statute.]

*Mr. *Parker*, in reply, referred to *Pownall v. King*,^(d) [*81] and the other cases collected in the note *In re Joseph and Webster*,^(e) and the observations of Lord Eldon in *Gwinnett v. Bannister*, as showing that, if the question had never been decided on argument, the court had always recognized the jurisdiction and acted accordingly.

Nov. 9th.—THE LORD-CHANCELLOR.—I have read this bill for the purpose of seeing whether there was any charge in it which would save it from the question of jurisdiction.

The bill states the dispute between the parties, and that there had been a reference to arbitration and an award; and it al-

(a) 5 Sim. 156. (b) 3 Myl. & K. 431. (c) 4 Myl. & Cr. 431. (d) 6 Ves. 10.
(e) 1 R. & My. 496.

 1846.—*Heming v. Swinnerton*.

leges certain objections to the award as not final, not mutual, &c., and prays an injunction to restrain the defendant from making the submission an order of the court. It, therefore raises the question whether the case is within the statute, and whether this court has jurisdiction to interfere in this form. I am sorry not to have a more accurate note of the Vice-Chancellor's judgment; but from the note with which I have been furnished, I collect that he proceeded on this,—that the reference had not been made an order of court at the time when litigation commenced, and when the demurrer brought the matter before him.

If that be the ground of his Honor's judgment, it reduces the question to a very narrow compass, viz. whether the [82] cases of *Davis v. Getty*, *Dawson v. Sadler*, *and *Nicholls v. Roe*, as decided by Lord Brougham on appeal, are to be considered as the law of the court, or whether the opinion of the Vice-Chancellor expressed in *Nicholls v. Roe* was correct, that the jurisdiction was not ousted by the statute, where the reference had not been made an order of court before bill filed.

It is not necessary for me to enter into the soundness of the doctrine one way or the other: for it is sufficient that the rule recognized in the cases to which I have referred has been the established doctrine of the court for a considerable length of time, and that it has recently been affirmed on appeal in *Nicholls v. Roe*, when the question was distinctly brought before it in consequence of the expression of a contrary opinion by the Vice-Chancellor. It is not to be expected that in a question of this kind upon a statute, the court should go back again from the construction which has prevailed in this branch of it for so many years. But I have no disposition whatever to shake the authority of those cases, or to interfere with the doctrine which I find existing; and, therefore, so far as regards the ground on which the Vice-Chancellor seems to have proceeded, I think that *Nicholls v. Roe* ought to have been the guide of his decision, and that the opinion he has expressed upon that point is erroneous.

But another ground is now suggested, and it is said that the Court of Chancery is not one of the courts upon which the summary jurisdiction given by the first section of the 9 & 10 W. 3, c. 15, is conferred under the title of "Courts of Record." And

1846.—Heming v. Swinnerton.

it certainly does appear that it has been a matter of some doubt, though I cannot say I was aware that it was one on which doubt could be entertained. But after the cases of *Joseph and Webster*,^(a) and *Pownall v. King*,^(b) where Lord Eldon [*83] actually ordered, after the publication of the award, that the submission should be made an order of this court, it can no longer be questioned that this court is within the provisions of the statute. And I think the second section of the statute shows it also.

A third point was, that, supposing the case to be within the statute, there was no reason why the jurisdiction to set aside the award should not be exercised in this form, by bill: but it appears to me that the jurisdiction by bill is excluded by the statute; for it was evidently intended, if it is not done in express terms, to exclude any jurisdiction to interfere with the enforcement of an award, but that which is specially provided by the statute.

Being therefore of opinion that the case is within the statute, and that, that being so, the jurisdiction by will is excluded, I think that this demurrer ought to have been allowed, and that the decision of the Vice-Chancellor must be reversed.

*IN THE MATTER OF CATHERINE ROBSON and [*84]
ISABELLA AINSLIE.

1846: Nov. 3.

The Lord Chancellor will not make an order for a commission upon a petition of right, without notice to the Attorney General.

MR. ANSTAY applied upon a petition of right, on which the royal indorsement of "Let right be done" had been made, that a commission might issue to inquire into the allegation of the petition.

In answer to an inquiry by the Lord Chancellor, whether the Attorney-General had had notice of the application, Mr. Anstay

(a) 1 R. & M. 496.

(b) 6 Ves. 10.

1843.—In the matter of Catherine Robson and Isabella Ainsley.

stated that he had not, as it was considered, since his Lordship's decision^(a) in the cases of the Baron de Bode and of Lord Canterbury, that the commission being a matter of right, the granting it was of course, and that the application, therefore, did not require notice.

THE LORD CHANCELLOR.—If you can get the writ without coming to the court, I shall not interfere with you; but, if you come here for it, I shall make no order without notice to the Attorney-General.

Notice was accordingly given to the Attorney-General, and upon his appearing on a subsequent day, and offering no opposition to the motion, the order was made.

[*85] *IN THE MATTER OF BARON DE BODE.

IN THE MATTER OF VISCOUNT CANTEBURY.

1840: July 15.

The first step in proceedings upon a petition of right on which the royal endorsement has been made, is to ascertain the facts on which the petitioner's claim is founded; and a commission for that purpose is of course, unless the Attorney General be willing to admit the facts as alleged, and to take issue upon them by demurrer.

APPLICATIONS similar to that in the last case were made in these cases in the years 1839 and 1840. Both were disposed of together, on the 15th July 1840, when the following judgment^(b) was delivered on the case of the Baron de Bode, which stood first in the paper.

THE LORD CHANCELLOR.—This case comes before me upon a

(a) See the next case.

(b) This judgment having been delivered before the present Reporter entered upon his duties in that capacity, the report of it has been prepared with the assistance of the short-hand writer's note, for which the Reporter is indebted to Mr. Anstey.

1846.—*In re Baron de Bode*.—*In re Viscount Canterbury*.

petition of right, with the usual indorsement by the Queen, "Let right be done;" and it is an application on the part of the petitioner, that what is alleged to be the usual course may be taken, and that a commission may issue. It was opposed by the Attorney-General, who contended, that in this stage of the case it was competent to raise before me objections to the relief prayed by the petition, or, I should say, to the case stated upon the petition, the object of the petition being rather for liberty to go on with the proceedings than for any specific relief to be administered by this court.

In support of that proposition, although I have had the benefit of two arguments, one upon this petition, and the other on Lord Canterbury's, no case has been cited in which the court has adjudicated on or inquired *into the merits of the [*86] case stated upon the petition. The exercise of such a jurisdiction, if any such existed, would obviously be attended with great difficulty, and liable to serious objection. There is, in fact, nothing before me but the petition of the party, praying for liberty to interplead with the Attorney-General, and to adopt those proceedings which, according to the course which has been followed in other cases, are necessary to be pursued, in order to bring the question to an issue between the party claiming and the crown. If I were, on the discussion of the merits, to form an opinion in favor of the petitioner's claim, it is not very obvious how a remedy is to be applied for that which, in such a case, the petitioner would have established as his grievance. If, on the other hand, I were to form an opinion against the claim, I apprehend it is quite certain, that the petitioner would have no means of questioning the propriety of that decision elsewhere, because there would be no record.

It would, therefore, be doing any thing rather than that which the crown by its indorsement on the petition has directed to be done: it would not be "doing right;" for, although the adjudication upon the merits might be correct, it would be precluding the party from that which is the right of the subject, to have such claims as he thinks proper to make, asserted in due course of litigation, with the means of ultimate appeal in case the judgment be not satisfactory.

1846.—*In re Barou de Bode*.—*In re Viscount Canterbury*.

In the absence of any case, or any authority in support of the argument of the Attorney-General, I thought it expedient to direct that a search be made in the records of the petty bag office, in order to see whether any record remained in that office of petitions of right. Because if the chancellor, to whom the [*87] petition is sent *by the crown, had in former times exercised any jurisdiction, or expressed any opinion, on the merits of the case, those proceedings would certainly be found in the petty bag office, if his judgment had been against the claim of the petition. In the event of his opinion being in favor of the claim of the petition, the case, no doubt, would have taken the ordinary course, and found its way to a court of law: but if the judgment had been against the claim of the petitioner, it would have stopped in the petty bag office.

On that search being made, no record has been found of any such proceedings; from whence it seems necessarily to be inferred that the proceedings, passing through this court, have in all instances been forwarded to a court of law, for the purpose of adjudication on the rights of the parties.

Now it is supposed, and there seems very good reason for the supposition, that this proceeding by petition of right was adopted on account of the inconsistency which there would be in having a suit instituted against the crown by the crown's own writ, and the obvious impropriety of having the crown brought into litigation with the subject without its own immediate consent.

Assuming that to be the origin of the proceedings, one would naturally suppose, that on this petition coming to the court of chancery with the consent of the crown indorsed, it has been viewed by this court in the nature of an application for an original writ. If that be so, then this court ought to deal with it as it does with applications for original writs; and I find that in Brooke's Abridgement, tit. Petition, pl. 34, the petition of right is viewed precisely in that light.

[*88] *Having, then, to consider this case in the absence of any authority in support of the argument of the Attorney-General, and finding that there is no record left in this court of proceedings of this nature, I have now to inquire into some of the authorities which are to be found in the books on the other

1846.—*In re Bardon de Bode*.—*In re Viscount Canterbury*.

side of the question ; and it is very satisfactory to observe that these authorities, which are all of ancient date (for the proceeding is very unusual in modern times,) seem to confirm the view which I had taken, namely, that in the present state of the proceedings, I as Chancellor had no jurisdiction to investigate the merits of the case.

In Staunford's Pleas of the Crown, fo. 72, c. 22, this is stated : —“ After the petition is endorsed, it shall be delivered to the Chancellor of England, and then shall there be a commission awarded out of the chancery to find the right or title of him that sueth the petition ; which being found by inquest, then he may interplead with the king, and not before.” Now that is a very distinct authority that there is no record, no suit, nothing but that which stands in the place of the writ, until there be a finding by inquisition in favor of the party suing, or, which comes to the same thing, until the Attorney-General, on the part of the crown, not asking that an investigation should take place, confesses the facts as stated on the petition.

In the same book, fo. 73, c. 22, this is stated : —“ In every petition, whether it be sued in the parliament or elsewhere, writs of search shall be awarded to search the king's title 'ere the party shall interplead with the king.”

According to this authority, before a party can interplead with the king, there ought to be, not only a *com- [*89] mission to inquire into the title of the party, but also a writ of search to ascertain the title of the king ; whereas, the argument on the part of the Attorney-General in this case is, that the party is to interplead with the king not only before there is a writ of search, but before any commission has issued.

It is on the same principle that Blackstone, 3d vol. p. 256, states the course of proceeding : —“ That upon the answer, ‘ Let right be done,’ a commission shall issue to inquire of the truth of the suggestion, after the return of which, the King's Attorney is at liberty to plead in bar, and the merits shall be determined on issue or demurrer, as in a suit between subject and subject.”

[His Lordship then referred to Lord Somers' argument in the Bankers' Case, 14 State Trials, 59 ; Brooke's Abr., tit. Petition,

1846.—In re Bardon de Bode.—In re Viscount Canterbury.

pl. 26 ; and Viner's Abr., tit. Prerogative, Q. 13, 3, as authorities to the same effect.]

From all these authorities it appears that in the present stage of this case, that is, on the bringing into chancery of the petition with the royal indorsement, "Let right be done," there is no suit or proceeding upon which any judgment can be given until the commission be returned and found for the petitioner, or the facts stated by him be admitted by the Attorney-General. Until this take place he has no *locus standi* as against the crown.

I am, therefore, of opinion that the whole duty I have to perform, in the present stage of the case, is to permit the party to pursue the usual course for the purpose of prosecuting [*90] his suit ; and as I am not at liberty to adjudicate upon the merits, I wholly abstain from expressing any opinion upon them.

The other case of Lord Canterbury, is precisely the same in point of principle, and therefore of course the same order must be made.

Commissions were ordered to issue in both cases, but that in the first only was executed, it having been arranged in the second that the petition should be amended in such a manner as to enable the Attorney-General to admit its allegations and demur. See 1 Phill. 306.

[*91]

*KIDD v. NORTH.[1]

1846: July 22 ; Dec. 5.

A legacy given by an incomplete testamentary paper held to be in substitution for two legacies of greater amount given to the same party by a previous will and codicil.

If an incomplete testamentary paper, made before the 1st January, 1838, contains internal evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been done by a previous complete will, the court will give effect to the new disposition as far as it goes, in substitution for the former, but will treat the former one as operative so far as no substituted disposition is provided in its place.

[1] S. C. 14 Sim. 473.

1846.—Kidd v. North

THE question in this case was, whether a legacy of £500 given by an incomplete testamentary paper, which had been admitted to probate with a will and three codicils of prior date, was in addition to, or substitution for, legacies of larger amount given by those instruments.

The will which was dated the 19th of July, 1830, commenced as follows :—“ This is the last will and testament of me, John Kidd of Liverpool, in the county of Lancaster : First, I direct the payment of all my just debts, my funeral and testamentary expenses, and the charges of the probate of this my will, out of my personal estate, which I confidently hope will be much more than sufficient for that purpose ; then I give and bequeath to my son William Kidd the sum of £20, to be paid to him within one month next after my decease, whose receipt, notwithstanding he may not have attained his age of twenty-one years, shall be a good discharge to my executors hereinafter mentioned : I give and bequeath unto James Lowe of Liverpool aforesaid, solicitor, and William Simpson of the same place, at present under articles to me as an attorney, the sum of £500 in trust, to pay to my said son £50 every six months, until he has received the said sum of £500, the first payment to commence and be made at the end of six months after my decease. I give and bequeath unto the said William Simpson all my law books, office desks, stools, and iron book cases, except the large iron chest which runs upon wheels, which I direct my trustees and executors to keep for the safe custody of my various *title- [*92] deeds, until the whole of my real, copyhold, and leasehold estates are sold and disposed of ; and after the same shall be so sold and disposed of, I give and bequeath the same iron chest, with the two keys thereunto belonging, unto the said James Lowe: I give and bequeath to the said James Lowe and William Simpson the sum of £100 each to be retained by them at the end of six calendar months next after my decease : I give and bequeath unto John Shaw Leigh my gold watch, gold chain, and the gold seals appended thereto, and the gold key, in trust, for such of his sons who shall first attain the age of fourteen years, then to be delivered to him : I also give and bequeath unto

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such female servants who may be in my service at the time of my decease, the sum of £5 a piece for mourning."

The testator then devised and bequeathed all his real and personal estates, not thereinbefore disposed of,—“in which personal estate,” he said, “I do hereby expressly include all the property bequeathed to me by my late brother William Kidd, and I do hereby declare that the reason why I have mentioned this circumstance is, because it has been erroneously and impertinently reported that I have no power to dispose thereof;” to his friends the said James Lowe and William Simpson, their heirs, executors, &c., in trust, to convert the whole into money, and to invest the proceeds in manner therein mentioned, and to stand possessed thereof, and of the securities in which the same should be, from time to time invested upon certain trusts therein mentioned for Elizabeth Kidd and Maria Kidd, whom he described as the widows of his two relatives William Kidd and Thomas Kidd, and their respective children. The will then contained the usual devise of estates vested in the testator as mortgagee or trustee, and the usual power to appoint new trustees [“93] and clause of indemnity, “and concluded with the appointment of James Lowe and William Simpson as executors.

The first codicil, which bore date the 6th February, 1832, was as follows:—“This is a codicil to, and to be taken as part of, the last will and testament of me &c., bearing date the 19th July, 1830, whereas, I have by my said will devised and bequeathed all my real and personal estates unto James Lowe and William Simpson, their heirs, &c., on the trusts therein mentioned; now I do hereby give and bequeath to Bridget Bibby of, &c., in consideration of her faithful services to my late aunt and myself, the sum of £2000, which I hereby direct my executors to pay to her within six months after my decease, and to pay the duty imposed upon legacies out of the residue of my estate and effects, and I do hereby confirm my said will.”

The second codicil, which bore date the 10th November 1832, and commenced with the same introductory words as the first, merely revoked the legacy given by the will to William Simpson and the appointment of him as one of the executors.

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By the third codicil, which bore date the 10th March, 1834, and had the same introductory words, after reciting from the will the bequest of £200 to Lowe and Simpson in trust for his son William, and the general residuary devise and bequest to the same parties in trust, and the appointment of them as executors, and further reciting the death of James Lowe, and that William Simpson had not conducted himself to his (the testator's) satisfaction, the testator revoked all the gifts &c., in his will contained, to William Simpson as trustee and the appointment of him as executor; and devised and bequeathed all his real estates and all his personal *estate, not given [*94] or bequeathed by his will, to his friends John North and Ambrose Lace, their heirs, &c., on the trusts in the will contained, with all the powers, authorities and idemnities which would have vested in the said Lowe and Simpson, in case they had been living at his death, and this codicil had not been made; and in every other respect he confirmed his will, and gave to John North and Ambrose Lace £200 each, for their trouble as executors.

The will and all the codicils, except the first, were signed and duly attested by three witnesses; the first codicil was signed, but not attested.

The unfinished testamentary paper which had neither date signature, nor attestation, was in these words:—"This is the last will and testament of me John Kidd, late of Liverpool, but now of Roby in the county of Lancaster, gentleman, as follows:—First, I direct the payment of all my just debts, and particularly any I may owe to my servants who may be living with me at the time of my decease, my funeral and testamentary expenses, and the charges of the probate of this my will, out of my personal estate, which I confidently hope will be much more than sufficient for that purpose; then I give and bequeath unto my son William Kidd the sum of £19 19s. to be paid to him within ten days after my decease: I also give and bequeath unto Bridget Bibby, my present servant, if she shall be in my service at the time of my decease, the sum of £500, and to my servant Joseph Ratcliffe, if he shall be in my service at the time of my decease, the sum of £500, to be paid to each of them at the end

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of nine calendar months next after my decease, free and clear from any duty now or hereafter to be imposed upon legacies, which duty I direct and authorize my executors hereinafter named, to pay out of my personal estate: I give and be-
[*95] queath unto my *friends Ambrose Lace and my partner William Eaton, both of Liverpool aforesaid, gentleman, the sum of £300 each; and to the said William Eaton, all my law books, office desks and stools, and iron book-cases and the keys thereto respectively belonging, and direct them to pay the legacy duty on such legacies out of my personal estate: I also give and bequeath unto [] my gold watch with the gold chain, seals and key appendant thereto, to be delivered to him free from legacy duty. I also give and bequeath unto such of my friends whom I shall name to attend my funeral, and who shall attend the same, the sum of £19 19s. each for mourning; and as to all my lands, tenements, hereditaments, whether real, copyhold, or leasehold, or of whatsoever nature the same may be, and also as to all the residue of my personal estate and effects, of what nature or kind soever and wheresoever the same may be, over which I have, or at the time of my decease may have, a controlling power, and also such term, estate, and interest as I may have in any leasehold estate at the time of my decease (and I do hereby declare that, in the bequest of the residue of my personal estate, I mean to include whatever property I became possessed of under the will of my late brother William; and I have thought it necessary to make this declaration on account of a certain person having very impertinently and frequently reported that I have no power to dispose thereof) unto my friends the said Ambrose Lace and William Eaton, their heirs, administrators, and assigns, according to the nature and quality thereof respectively, upon trust, that they and the survivor of them, and the heirs, executors, administrators or assigns of such survivor, shall and do stand seised and possessed thereof, and of every part hereof, to, for, and upon the several uses, trusts, ends, interests, and purposes hereinafter mentioned, expressed and declared of and concerning the same; that is to say. . .

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*Bridget Bibby remained in the service of the testator [*96] until his death, which happened in March 1835.

The bill was filed by the residuary legatees named in the will, against the trustees and the particular legatees under the several instruments, for the administration of the estate.

The question came before the Vice-Chancellor of England upon exceptions taken to the master's report under the decree; when his honor held, overruling the exceptions, that the legacy of nineteen guineas, given by the incomplete instrument to the testator's son William, was a substitution for the legacy of 20*l.* given to him by the will, and that the legacy of 500*l.* given by the same instrument to Bridget Bibby, was a substitution for the legacy of 5*l.* given to her by the will, and for the legacy of 2000*l.* given to her by the second codicil.

This was an appeal by Bridget Bibby from that decision.

Mr. *J. Parker* and Mr. *Freeling*, for the appellant, relied upon the difference in the amounts of, and the motives for, the two gifts of 2000*l.* and 500*l.*, the one being absolute and apparently regarded as a remuneration for past services; the other contingent on the legatee's remaining in the testator's service until his death. They also insisted on the danger of treating a legacy given by an incomplete instrument as a substitution for a legacy of larger amount in a prior perfect will, on account of the possibility that if the testator had completed the instrument, he might in a subsequent part of it, have made some further disposition in favor of the legatee.

Mr. *Bacon* and Mr. *Tillotson*, for the respondents, the residuary legatees.

*Mr. *Hoffman* for the trustees.

[*97]

The following cases were cited.—*Hemming v. Gurrey*,(a) *Heming v. Clutterbuck*,(b) *St Alban's v. Beauclerk*,(c) *Attorney*

(a) 2 S. & St. 311.

(b) 1 Bl. N. S. 479.

(c) 2 Atk. 636.

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General v. Harley,(a) *Jackson v. Jackson,*(b) *Russell v. Dixon,*(c)
Suisse v. Lord Lowther,(d) *Fraser v. Byng,*(e) *Walsh v. Glad-*
stone.(f)

Dec. 5.—THE LORD CHANCELLOR.—When the testamentary papers of which probate is granted appear to give several legacies to the same persons, it is often extremely difficult to ascertain what was the real intention of the testator; and to attain that object as far as possible, certain rules have been laid down and nice distinctions taken; but such rules and distinctions are applicable only to cases in which there is no internal evidence of intention; for where that is to be found, it must prevail. Such is the present case; for I conceive it to be clear, that the last testamentary paper was intended to be in substitution for all the others, and to supersede the provisions contained in them. It is, indeed, incomplete; but the ecclesiastical court having granted probate of it, no question can be made as to its being testamentary, and operative as such so far as it goes.

It is reasonable to give such effect to the incomplete instrument, if it contains within itself evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been done before; but if the new disposition applies only to part of the subject-matter, the instrument being upon the face of it incomplete, and not applying to other parts, it is consistent with all principle to give effect to this intention, so far as it is expressed, but to consider the first disposition as operative, so far as no substituted disposition is provided in its place.

Many authorities, to which I propose shortly to refer, establish this doctrine; but the first matter for consideration is, does the last testamentary paper contain within itself evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been before done? It appears to me very clear that such was the testator's intention.

The first testamentary paper is described as his last will and

(a) 4 Madd. 263.

(b) 2 Cox, 35.

(c) 1 Con. & Law, 284.

(d) 2 Hare, 424.

(e) 1 R. & M. 90.

(f) 13 Sim. 261. 1 Phil. 290.

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testament, and begins by directing payment of his debts, and makes a small provision for his son. By it he gave nothing to the appellant, except as she might answer the description of a female servant living in the testator's service at the time of his death, in which capacity she might have been entitled to 5*l.*; but he gave his law books to one Simpson, and his watch and seals to one Leigh, and disposed of his real and personal estate for the benefit of Elizabeth and Mary Kidd and their children.

The second, third, and fourth testamentary papers are described as codicils, and directed to be taken as part of his will, and in the second and fourth he in terms confirms his will, except as thereby altered. By the second of these he gave 2000*l.* to Bridget Bibby for her faithful services to her late aunt and to himself. *The third and fourth related to the ap- [*99] pointment of his executors and trustees.

The last testamentary paper, upon which the question arises, began, as did the first, with the words "This is the last will and testament of me," and again directs payment of all his debts. He gave 19*l.* 19*s.* to his son, and to Bridget Bibby, if she shall be in his service at the time of his death, 500*l.* To Eaton all his law books, and his watch to _____, not filling up the name, and all his real and personal estate upon trust to sell and "to hold same upon the trusts hereinafter mentioned; that is to say,"—and there it stopped.

Of this paper probate has been granted. It must therefore be considered as testamentary, and an effectual declaration of the testator's intention; and the question is, did he intend this to be an addition to his former testamentary dispositions, as all the intermediate papers were declared to be, or did he intend to substitute this last paper for all the former? for if he did, so far as it contains a declaration of his intention, it is to be considered as a revocation of his intention as before declared as to the particular matters, and as a substitution of the new disposition in its place.

As to the direction for payment of his debts, and the gift of his watch and law books, and the gift of the residue of his real and personal estate, the substitution is beyond all doubt. And could he have intended that the former disposition should stand

1846.—*Kidd v. North.*

only as to the legacy of 2000*l.* to Bridget Bibby, and perhaps some other small legacies? If so, the last paper could not have been his last will and testament, which he tells us he intended it should be considered. In *Jackson v. Jackson*,^(a) Mr. [100] Justice Buller thought it too clear for argument, that when a testamentary paper, incomplete as a will, appeared on the face of it to be intended as a substitution for a former complete will, the legacies given by the latter paper only were to take effect. That case indeed contains many of the circumstances of the present. It is, as to the facts, the case most in point with the present; but the principle is recognized in many others, as the *Attorney-General v. Harley*,^(b) *Heming v. Clutterbuck* in the House of Lords,^(c) and *Fraser v. Byng*.^(d)

So far as this question depends upon the latter instrument being incomplete, it cannot arise upon any instrument made after the 1st of January 1838; but whether legacies are to be considered as additional or substitutional, questions may arise upon completed instruments.

I am of opinion that the Vice-Chancellor's judgment was right, and that the appeal must be dismissed with costs.

[101]

**CARMICHAEL v. CARMICHAEL.*

1846: Nov. 7.

A party sued as executor *de son tort* jointly with the rightful executor, stated by his answer, that he had, before the bill was filed, accounted for his receipts and payments to his co-defendant, and paid over to him the balance: *Held*, that such settlement would not be binding on the plaintiff, who was beneficially interested in the estate, and therefore the court refused to insert in the decree the usual direction as to not disturbing settled or stated accounts.

Such a direction is applicable only to an alleged settlement of accounts between plaintiff and defendant, and not to one between co-defendants.

An executor *de son tort* is subject to all the liabilities, but entitled to none of the privileges, of an ordinary executor.

^(a) 2 Cox, 35.
^(b) 4 Madd. 263.^(c) 1 Bl. N. S. 479.^(d) 1 Russ. & My. 90.

1846.—Carmichael v. Carmichael.

THIS was an appeal from a decree of the Vice-Chancellor of England, pronounced in the year 1834, in a suit for the administration of a testator's estate. The persons named as executors having all renounced probate, the testator's widow took out administration with the will annexed. The bill was filed by a daughter of the testator, who was beneficially interested under his will, against her mother, and also against her brother as executor *de son tort*, the bill alleging that he had, before administration was granted to the widow, and without authority, collected a considerable part of the estate in Demerara, in respect of which it prayed an account against him, as well as the usual account against the widow.

The brother, by his answer, admitted that, being in Demerara at the time of the testator's death, he had collected the effects and paid the debts of the testator in the colony; but stated that he had, before the bill was filed, accounted for his receipts and payments and paid over the balance to his mother as administratrix; and he submitted that he was not accountable to the plaintiff.

No evidence was given, at the hearing, of the settled account, and his honor made the usual decree for an "ac- [*102] count against both the defendants, with liberty to the master to state special circumstances.

After the decree the brother died, and the suit was revived against his personal representative.

The master, in proceeding under the decree, gave effect to the settled account, and accordingly found that nothing was due from the brother's estate; but exceptions taken to his report having been allowed, on the ground that he had no authority to treat the account as settled, the personal representative of the brother presented this petition of rehearing, insisting that the decree ought to have contained a direction to the master, in case he should find any account to have been settled between the brother and the administratrix, not to disturb the same, but with liberty to the plaintiff to surcharge and falsify.

Mr. Wood and Mr. Campbell, for the appellant.—The administratrix, being the legal hand to receive the balance, was com-

1846.—Carmichael v. Carmichael.

petent to give a valid discharge for it, and to settle the account on which it arose; and consequently, if the appellant had proved the settlement of account at the hearing, he would have been entitled to have the bill dismissed as against him; but that the suggestion in the answer, though unsupported by evidence, is sufficient, according to the ordinary practice, to entitle him to the inquiry which he now asks.

[THE LORD CHANCELLOR.—That is not an uncommon practice, when the account is alleged to have been settled between the plaintiff and defendant; but have you any authority for it in the case of an alleged settlement of account between [103] co-defendants? I want to know, too, how you distinguish this case from one in which there are two executors, and one dies, and his representative accounts for his receipts with the survivor? That does not discharge him from liability to account, in a suit for the administration of the estate; and the authorities show that an executor *de son tort* cannot say he is so, as against those who charge him as executor. He has all the liabilities, but none of the privileges, that belong to that character.]

At law, an executor *de son tort* is discharged if he pays over what he has received to the rightful administrator before action brought; *Padget v. Priest*, (a) *Curtis v. Vernon*. (b) [1] There is no reason why there should be a different rule in this court. In the case put by your lordship of the representative of a deceased executor, it has never, we believe, been decided that a settlement of accounts between him and the surviving executor, if made fairly and before bill filed, would not be binding upon the parties beneficially interested: if it were otherwise, the estate of a deceased executor could never be discharged without

(a) 2 T. R. 97.

(b) 3 T. R. 587.

[1] It is otherwise if the payment is made after suit brought. See *Curtis v. Vernon*, 3 T. R. 587; *Layfield v. Layfield*, 7 Sim. 172; where it was decided, that payments made by an administrator *de son tort*, pending a suit for an account of an intestate's estate, to a person who took out administration after the institution of the suit, and was thereupon made a co-defendant, would not be allowed.

1846.—Carmichael v. Carmichael.

a suit, which would be a great inconvenience. In this case the hardship is obvious, of calling upon the appellant to account over again to the plaintiff for all his receipts and payments in Demerara, after he has settled with the administratrix, and delivered up to her the vouchers for his payments before any suit was thought of.

Mr. Bacon and Mr. Chapman, for the plaintiff, referred to *Oxenham v Clapp*,^(a) *Webster v. Webster*,^(b) and *Sharland v. Mildon*.^(c)

*Mr. Wood in reply.

[*104]

THE LORD CHANCELLOR.—In this case the decree which is the subject of appeal was made so long ago as the year 1834. The bill was filed against the administratrix and a son of the testator, a brother of the plaintiff, and who, being at Demerara at the time of the testator's death, collected the testator's property there, brought it to this country, and paid it over to his mother, who was then the legal personal representative. It seeks an account not only against the mother, but also against the son, as having acted without authority.

It appears that the son not only paid over the amount of the property in his hands, but also accounted to the personal representative, and it is said that the result of that account is binding upon all persons claiming under the testator's will. The decree took no notice of that settlement, but directed the ordinary account against the son as being responsible to the plaintiff. The parties proceeded before the master under that decree, and, until the time when this appeal was presented, took no steps for the purpose of altering it; but finding, on exception to the master's report, that the court considered the master as not justified in treating the account as settled, they have now appealed from the decree, and ask that a direction may be introduced into it to the effect that, if the master shall find any account to have been settled between the defendants, he is not to disturb it, except by allowing the plaintiff to surcharge and falsify.

(a) 2 B. & Ad. 309

(b) 10 Ves 93.

(c) 10 Jur. 171.

Now, in the first place, this appears to me to proceed on an erroneous view of the practice of the court. It is quite [*105] true, that where the accountability of *the defendant to the plaintiff is established, and a settled or stated account is suggested by the answer, it is the practice of the court to introduce such a direction as is now asked, because in such a case the direction does not go to the root of the accountability of the party, but assuming him to be accountable, it merely enables the master in a certain event to qualify the mode of taking the account. But here, the account is alleged to have been settled not with the plaintiff but with a co-defendant, and the result of introducing such a direction in a case of that description would be, that there would be a decree directing accounts against two defendants, and at the same time directing the master to inquire into a fact which, if established, would show that the court was wrong in decreeing an account against one of the defendants at all.

Another objection to what is asked is, that it would be establishing this proposition, that an executor *de son tort*, by settling with the personal representative, can discharge himself from liability to the parties beneficially interested in the testator's estate.(a) And before I can do that, I should require it to be shown that one personal representative can discharge another from responsibility to the parties beneficially interested, by settling accounts with him; for an executor *de son tort* is subject to all the liabilities of an ordinary executor.

If, therefore, the case were quite new, and the suit were now before me for the first time, I should refuse the inquiry as not warranted either by practice or principle. But if these [*106] objections had not existed, I should *have hesitated long before I acceded to such an application after the length of time that has elapsed since the decree was made, without any explanation being given of the delay. For whether the inquiry was not asked for at the hearing, or, being asked for, was refused, is immaterial. In either case, the party has been guilty of great negligence in not coming sooner. The introduction of

(a) See and distinguish *Tyler v. Bell*, 2 My. & Cr. 89.

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inquiries of this kind into decrees is any thing but a matter of course ; and though the court in a proper case will do it, still it is a matter of discretion ; and in this, as in all other cases of discretion, the court must take care not to destroy its jurisdiction and defeat the general ends of justice, from a desire to do justice in a particular instance. In this case, however, the decree authorizes that which is sufficient to do justice between the parties, and bring the whole case before the court on further directions ; for the master is to take the accounts and to be at liberty to state any circumstances specially. And if the master should state, as a special circumstance, that an account was settled between the co-defendants, with all the facts connected with such settlement, the court would be in a condition to determine what, under all the circumstances of the case, justice required should be done.

Appeal dismissed with costs.

 *GOMPERTZ v. GOMPERTZ.

[*107]

1846: Dec. 8.

Illustration of the distinction between a direction in a will which goes to cut down or qualify a prior absolute gift, and one which only goes to regulate the mode in which such gift shall be dealt with and enjoyed.

THE question in this case arose on the construction of the residuary clause in the testator's will, which was in these words : "The residue of my effects I dispose of as follows : my sons to have two shares each, and my daughters to have one share each ; the children of my late daughter Elizabeth Cohen to have one share among them for their mother's one share ; but if my sons should think proper to give my daughters 3000*l.* sterling to each of them, for one share of the residue, I give my sons the option either to give my daughters 3000*l.* or one share ; but my son-in-law A. B. Cohen shall have the benefit of the children of my late daughter Elizabeth Cohen, either to take one share or 3000*l.* for her children for the residue share. And that I give to my sons and daughters of the residue, it is my will to be in this manner :—my daughters only to have the interest of the one

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share during their lives and after their deaths shall become to their lawful heirs, and one share of the two shares of each of my sons of the residue shall only have the interest of their one share during their lives, and after their deaths, shall become to their lawful heirs. My sons shall have time to consider, three years, if they will give my daughters one share or 3000*l.* each, which is meant, the interest of the said sum only. The two shares of my sons of the residue is meant one at their own disposal, and the one share only the interest during their lives, and my daughters only the interest of their own share of the residue, or of the 3000*l.* of the residue.”(a)

[*108] *The testator had five sons and five daughters. By the decree in a former suit, the share of Mrs. Hollander, one of the daughters, who had then no children, had been directed to be carried over to her separate account, the interest to be paid to her for life, with liberty to any party to apply. On her death, without children, in July, 1844, the question arose, whether her share belonged to her husband as her administrator or to the next of kin of the testator. This suit was instituted by the next of kin, to decide that question. At the hearing of the cause before the Vice-Chancellor of England, his Honor decreed the fund to the next of kin.

This was the husband’s appeal from that decision.

Mr. *Walker*, for the Respondents, having briefly stated the case the Lord Chancellor called upon the counsel for the appellant.

Mr. *J. Parker* and Mr. *Speed*, for the appellant, contended that there was an absolute gift, in the first instance, of an integral share to each of the testator’s daughters, and that the subsequent directions as to their children were not added with a view to reserve any contingent benefit to his own estate, in the event of any of the daughters dying without children, but merely for the purpose of carrying out more effectually his intentions of bounty towards his daughters and their children, if they should have any; and they relied on *Whittel v. Dudin*,(b) *Mayor v. Townsend*,(c) *Campbell v. Brownrigg*,(d) *Hulme v. Hulme*,(e)

(a) This is extracted literally from the copy of the will used at the hearing

(b) 2 J. & W. 279. (c) 3 Beav. 443. (d) 1 Phill. 301. (e) 9 Sim. 644.

1846.—Gompertz v. Gompertz.

observing, also, that this *construction of the clause [*109] was strengthened by the circumstance that it was a disposition of residue.

THE LORD CHANCELLOR.—I think the Vice-Chancellor right in the construction which he has put on this clause, and that after the death of the daughter without children her share went to the testator's next of kin. The cases referred to all proceeded on the same principle, but which is not applicable to the present case. In those cases, there was a gift, and then a direction as to the manner in which the legacy was to be invested and applied for the benefit of the legatee; not a diminution or qualification of the original gift, but merely a direction as to the mode in which it was to be dealt with and enjoyed in a certain event. But here I consider the directions contained in the latter part of the clause as a diminution of the original gift, and, therefore, that whatever interest is not exhausted by the gift as so diminished, remains the property of the testator.

It is quite true that the first sentence might raise a question; for the testator divides his property into shares, and says, "my daughters to have one share, my sons two;" and if he had afterwards done no more than direct how the shares so given were to be laid out and enjoyed, the case would have fallen within the principle of those cited; but the subsequent directions relate not to that, but to the nature and substance of the gift itself. For whenever in the course of these directions the testator refers to the *shares* of his daughters, it is always accompanied with an explanation of the sense in which he means to use the word; that is, a life interest only, with remainder to their children. To such a case, it is clear, that the principle on which the appellant relies *does not apply, and, [*110] therefore, being of opinion that the Vice-Chancellor's decision was right, I must dismiss the appeal.

1846.—Lord v. Wightwick.

LORD v. WIGHTWICK.

1846: Nov. 6; Dec. 1.

Where the answer to a bill for an account sets up a counter claim, as to which it is doubtful whether it would or would not be available to the defendant as an item of discharge under the general account directed by the decree, the court, as the safer course, will make it the subject of a special inquiry.

A testator by his will gave an annuity to his daughter for her separate use, and subject thereto, devised and bequeathed all the rest of his property to his son, whom he appointed his executor.

The bill was filed by the daughter against her brother, praying an account of the testator's estate, and of the arrears due to her in respect of the annuity. The defendant by his answer stated, that shortly after the testator's death, he went to live with his sister (who was married, but living separate from her husband,) at a house where she then resided, that it was then agreed that they should bear the expenses of their establishment jointly, and that they had continued for several years to live together accordingly; but that he had nevertheless paid all those expenses himself; and he insisted that his sister's share of what he had so paid should be deducted from the amount of arrears due to her in respect of the annuity.

No evidence was adduced in support of that statement.

At the hearing of the cause before the Vice-Chancellor of England, his honor directed the usual "accounts of the testator's estate, and an account of what was due to the plaintiff for the arrears of her annuity, but did not direct any special inquiry on the subject of the defendant's counter-claim.

In proceeding under the decree in the master's office, the defendant carried in a state of facts relative to his counter claim, and exhibited interrogatories for the examination of the plaintiff in support thereof, which the master allowed; but exceptions taken by the plaintiff to the master's certificate having been allowed by the Vice-Chancellor of England, the defendant appealed from the decree, insisting that the agreement alleged in his answer ought to have been made the subject of a special inquiry.

1846.—Lord v. Wightwick.

THE LORD CHANCELLOR at this stage of the argument intimated an opinion that the decree, as it stood, was sufficient for the defendant's purpose, without the addition of any special inquiry, inasmuch as, if the agreement suggested by the answer were proved, the payment by the defendant of the plaintiff's proportion of the expenses of the joint establishment would be a payment on account of her annuity, and available as such in taking the account actually directed; for the annuity, being given to her for her separate use, would be liable to her share of the expenses without any express contract for the purpose; *Murray v. Barlee*.(a) If, therefore, the decision of the Vice-Chancellor upon the exceptions had turned on the point stated by the counsel for the appellant, the appeal ought to have been from that order and not from the decree; but, as it was clear that the question must be determined in some shape or other before the amount of the arrears due to the "plaintiff" [*112] could be finally taken, his lordship gave leave to the appellant to amend his petition of appeal for the purpose of bringing both questions under his review in an alternative form.

Dec. 1st.—The petition was accordingly amended; and on the case coming on again, and the whole matter both of the decree and the order being opened,

THE LORD CHANCELLOR, after expressing an opinion that there were some parts of the interrogatories which went too far, said, that on further consideration of the decree, he thought an inquiry ought to have been directed, for that wherever it was doubtful whether a particular claim raised by an answer was or was not included in a general account directed by the decree, the safer course was to make it the subject of a special inquiry, and that the Vice-Chancellor would probably have done so if the point had been pressed. The proper course would therefore now be to vary the decree by inserting an inquiry whether there was any such agreement as stated in the answer, and what, if any thing, was due to the defendant under it.

(a) 3 Mylne & Cr. 203.

1846.—Lord v. Wightwick.

Mr. *J. Parker* and Mr. *Rolt* appeared for the appellant.

Mr. *Stuart* and Mr. *C. Barber* for the respondent.

[*113]

*CHUCK v. CREMER.

1846: Dec. 1.

An order of the court of which the party affected by it has notice, though not formally served upon him, is not to be disregarded or treated by him as a nullity, however certain it may be that the order is erroneous, and would, upon a proper application for that purpose, be discharged.

THIS was an application to discharge an attachment issued by the plaintiff against the defendant for want of an answer, and to discharge an order of the Vice-Chancellor of England refusing a similar motion with costs.

The time for answering the bill having expired on the 1st June, the defendant took out a warrant before the master for further time. On the attendance before the master on the 4th June, the return day of the warrant, it was arranged by consent that the defendant should have a month's further time from the 1st June, and the master endorsed the warrant accordingly; but the master's clerk by mistake drew up the order, dating it the 4th June, as an order for a month's time, without stating from what day the month was to begin. A copy of the order so drawn up was sent by post by the defendant's solicitor to the plaintiff's on the 11th June, and a few days after, the defendant's solicitor meeting the clerk of the plaintiff's solicitor in the street, and mentioning that the order had been forwarded to him by post, the clerk said, "Then I dare say it has found its way to my file." The plaintiff, however, treating the order as if it had been correctly drawn up according to the agreement, in which case the extended time for answering would have expired on the 28th June, wrote to the defendant's solicitor on the 27th, stating that unless the answer were filed on the following day, he

[*114] should issue an attachment: the answer *not being filed, the attachment in question was issued on the 30th.

1846.—Chuck v. Cremer.

Mr. *Js. Parker* and Mr. *Daniel*, for the motion, cited *Wilkins v. Stevens*.^(a)

Mr. *Rolt*, and Mr. *Kinglake*, *contra*, insisted, first, that a party who complained of irregularity in his adversary was bound to show that his own proceedings had been perfectly regular, which the defendant had not done, having neither entered the order with the clerk of records and writs, nor duly served it, and that the plaintiff had a right to presume that the order would be, and had been, drawn up in conformity with the agreement of the parties and the master's endorsement, and that he was not bound to take any notice of a copy of an order sent to him by post and varying from those terms: secondly, which they said was the ground of the Vice-Chancellor's refusal of the motion, that the order having been obtained on the defendant's application and for his own benefit, he was bound to see that it was correctly drawn up according to the terms agreed on, and that his availing himself of the error instead of immediately applying to have it set right as soon as he discovered it, was a fraud on the court as well as on the plaintiff, of which the defendant ought not to be allowed to take advantage.

THE LORD CHANCELLOR (without hearing a reply) said, that the circumstance of the order not having been entered was immaterial; for that a party, knowing that a certain order had been made, was not the less bound to respect it because it had not been entered. As to *the mistake (for it was [*115] not even suggested that it was not a mistake, or that any thing was done to mislead the master) it was the mistake of the master's clerk; an order not corresponding, it is true, with the agreement between the parties, but yet an order of the court was drawn up, and was existing; and there was proof of knowledge on the part of the plaintiff's solicitor that there *was an order* in his possession, so that he could not plead the want of formal service as an excuse for disregarding it. Under these circumstances, his solicitor thought proper to treat the order as a nullity.

(a) 10 Sim. 617

 1846.—*Chuck v. Cramer.*

A solicitor, however, was not to form his own opinion as to whether an order was right or wrong : as long as the order stood it was to be respected.[1] The issuing of the attachment, therefore, before the period mentioned in the order had expired was an improper proceeding, and he should discharge it, however certain it might be that an application to discharge the order would succeed.

Attachment discharged.

[*116]

***IN THE MATTER OF WEBB.**

1846 : Dec. 5.

A bastard, tenant for life of real estates, being found lunatic, leave was given to his natural daughter, who had resided with him up to the time of his confinement, to carry in proposals for a committee of the estate as well as of the person, as a check upon the remainder-men.

THE inquisition taken under the commission issued in this case(a) having found that Mr. Webb (the subject of it,) was of unsound mind, the matter now came on again, upon the petition of the infant tenant in tail in remainder, praying that notwithstanding the order of July last, the master in lunacy might proceed in the appointment of committees of the person and estate under the general orders in lunacy ; and a cross petition by the lunatic's natural daughter, praying that she might be allowed to carry in proposals for that purpose.

(a) *Ante*, p. 10.

[1] That a special order entered under the direction of the court, although in violation of one of its standing rules, cannot be disregarded by the parties, or the officers of the court, so long as it remains in force, see *Osgood v. Joslin*, 3 Paige, 195 ; *Studwell v. Palmer*, 5 Paige, 166 ; *Jackson v. Jackson*, 3 Cow. 73. That the court, upon special application, may disregard an order irregularly obtained, see *De Genoe v. Harman*, 1 Russell & Myne, 494 ; *Studwell v. Palmer*, 5 Paige, 166.

 1846.—In the Matter of Webb.

Mr. *Romilly*, for the petition, did not oppose the prayer of the cross petition.

Mr. *Js. Parker*, for the cross petition.

THE LORD CHANCELLOR, after noticing that there was no legal relationship in either of the parties, said it was clear that the daughter ought to have a voice in the appointment of the committee of the person ; and as to the estate, although the tenant in remainder was most interested in the management of the estate, yet it was right that the person representing that interest should be checked on behalf of the parties who might ultimately become entitled to the lunatic's personal estate. The daughter, therefore should be at liberty to bring in proposals both as to the person and estate.[1]

*DUKE OF LEEDS v. EARL OF AMHERST AND OTHERS.[2] [*117]

1846: Nov. 17, 18, 19.

The statutory rule which gives to a remainder-man twenty years from the time when his title accrues in possession, for bringing an action or suit for the property, applies to a claim for compensation for equitable waste, as well as to a claim to the land itself. And therefore an account of equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of the plaintiff, as remainder-man in tail, having accrued within twenty years before the filing of the bill.

Upon a claim to a compensation for equitable waste, the court does not consider whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs, for a tenant for life has no right to alter the nature of property belonging to another person.

Distinction between acquiescence and the release of a right.

THIS was an appeal by the defendants from a decree of the Vice-Chancellor of England, directing an account to be taken of the benefit and profits derived by the late Duke of Leeds

[1] See note 1, *ante*, page 12.

[2] S. C. before V. C. 14 Sim. 357.

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from certain acts of equitable waste committed by him on the family estate of Kiveton, and payment of the amount of such benefit and profits, with interest at 4 per cent. from the time of his death, out of his assets.

The estate in question was, upon the marriage of the late Duke, settled, together with others, to the use of himself for life, without impeachment of waste, with remainder to his first and other sons in tail male, with divers remainders over. The alleged acts of waste consisted in pulling down the ancient family mansion-house, and cutting a quantity of the ornamental timber in the park. That was done in the year 1808; the plaintiff, who was the eldest son of the marriage and the first tenant in tail under the settlement, being then nine years old. On his coming of age in the year 1819, he joined his father in suffering recoveries of the settled estates, by which they were conveyed to such uses as the father and son should jointly appoint; and, in default of appointment, to the old uses. In 1828, the plaintiff, having married against his father's wishes, an estrangement between them ensued, which continued during the rest of [*118] the father's life-time. In the year 1838 the late Duke died, having by his will devised and bequeathed all his unsettled property, subject to an annuity to the Duchess dowager, to his son-in-law and his children, leaving to the plaintiff nothing but the settled estates. Shortly afterwards, this suit was instituted against the trustees and the parties beneficially interested under the late Duke's will.

The claim was resisted by the defendants upon two grounds; first, That the alleged acts of waste were an improvement to the estate, of which the plaintiff was actually enjoying the benefit: secondly, That, considering the length of time which had elapsed since the acts were committed and the other circumstances of the case, the plaintiff having never objected to what had been done, or made it a ground of claim during his father's lifetime, must be taken to have acquiesced in it, and to have waived all claim in respect of it, if he ever had any.

In reference to the first ground of defence it appeared that upon Kiveton House being pulled down, the park had been converted into a farm, which had ever since been let at a yearly

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rent of between 700*l.* and 800*l.*; and several witnesses, who were acquainted with the family at the time, deposed that, in their opinion, the dismantling of the house and park was a prudent step both for the Duke and those who were to follow him, as there was another mansion, Hornby Castle, in the same county, where the family had ever since resided, and the family estates were inadequate to support both.

As to the other ground of defence, it appeared that in the recovery deeds of the year 1819 no allusion was made to the acts in question; but the plaintiff having been at that time abroad with his father, and the deeds "having been pre- [*119] pared by the father's solicitor without any separate legal adviser being consulted on the part of the plaintiff, that circumstance was not much relied on. It further, however, appeared that the plaintiff had, on various occasions between that time and his marriage, concurred with his father in raising, under the joint power of appointment, sums, amounting to 25,000*l.*, for the benefit of his father, and 7000*l.* for the purchase of a commission in the army for himself; and that in the course of a protracted negotiation, which took place after the plaintiff's marriage, between himself and his father, with a view to an adjustment of their differences and a further re-settlement of the family estates, although the sums which he had concurred in raising for his father's benefit were repeatedly put forward by the plaintiff as a ground for stipulations beneficial to himself, the only occasion on which the acts of which now complained of were referred to, was in a written proposal submitted by his legal advisers to the late duke, in which, after stipulating that, in the event of the plaintiff's surviving his father and dying without a male heir, his wife should be entitled to Hornby Castle during her life, "there being, in consequence of Kiveton House having been pulled down, no other residence upon the estate fit and proper for a dowager Duchess to reside in," there was the following passage:—"The Marquis, in adverting to pulling down Kiveton House and disposing of the materials, ornamental timber &c., is not desirous of founding thereon any specific claim; but he cannot but think, in the ultimate arrangement, due consideration should be had to this circumstance, there being no house left on

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the estate fit for an eldest son's residence." The negotiation was ultimately broken off without coming to any result; but the late Duke afterwards, of his own accord, paid off the 25,000*l.* which had been raised for his benefit out of the settled estates.

[*120] "A third ground of defence taken by the answer was, that the late duke had expended, in draining and other permanent improvements on the Kiveton estate, sums considerably exceeding in amount what he had received from the acts of waste complained of; but this allegation was not supported by any evidence.

The argument, on the hearing of the appeal, turned almost exclusively on the second ground of defence.

Mr. *Bethell* and Mr. *Lloyd*, for the plaintiff, compared the case to one of forfeiture by a tenant for life, in which the remainderman had two periods of twenty years for making his claim, one commencing from the forfeiture, and the other from the accruer of his own title in possession.

They also observed, that the plaintiff could not be expected to have enforced his claim during the lifetime of his father, inasmuch, as he had then only a contingent interest in it; for even had he succeeded, the amount would only have been ordered into court to follow the uses of the settlement, and if the plaintiff had not, by surviving his father, acquired a right to bar the subsequent limitations, he would never have become entitled to the fund. *Powlett v. Duchess of Bolton*.^(a)

Mr. *Stuart*, Mr. *James Parker*, and Mr. *G. Russell* for the appellants.—This is too stale a demand for a court of equity to enforce. The analogy of the double remedy allowed in cases of forfeiture of an estate does not apply. There the remainderman is allowed two remedies, because he has two es-

[*121] tates, one accruing by the *forfeiture, and another by the original limitation; whereas here it is the same demand throughout. In *Harrison v. Hollins*,^(a) it was held, that if a mortgagee enter, during the lifetime of the tenant for life of the

(a) 3 Ves. 374.

(b) 1 S. & St. 471.

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equity of redemption, and remain in possession for twenty years, without acknowledgment of the mortgagee's title, the remainderman is barred, because he might have brought his title to redeem at any time during the twenty years.

[THE LORD CHANCELLOR.—That is where the mortgage is prior to the settlement. The mortgagee's title is derived from the owner of the inheritance, and, of course, cannot be affected by the mode in which the mortgagee may afterwards devise his estate.]

In *Bennett v. Colley*,^(b) where a father was bound to renew a lease, but had omitted to do so, Lord Brougham puts the son's right to renew upon the impossibility of his filing a bill with any effect during the lifetime of his father. So, in this case, the court will look, not to the time when the plaintiff's title accrued in possession, but to the time when he first knew of the acts on which he had founded his claim; and it is not disputed, that he knew of them as early as the year 1819, if not sooner. His omission to found any express and formal claim upon them from that time to the year 1838, notwithstanding the many transactions and negotiations which took place between him and his father in reference to the estates, can be accounted for only on the supposition, that he had from the first acquiesced in the propriety of what his father had done, and had resolved to found no claim upon it. This court looks *with [*122] great jealousy at claims postponed until they cannot be as effectually resisted as if they had been made sooner; ^(a) and this is a case in which the court ought to be peculiarly tenacious of that principle; for if the acts of waste complained of were done, as they appear to have been here, in the exercise of a sound discretion and for the benefit of the estate, it is highly probable, that the party who committed them would, from the same motive, although only tenant for life, have expended sums in the permanent improvement of the estate, which, if a claim of this kind were made in his lifetime, he might be in a condition to prove and take credit for, but of which, after his death, no evidence, as in the case here, might be attainable.

(a) 2 My. & K. 225.

(b) Beatty, 236.

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Mr. *Bethell* in reply.

Nov. 20.—THE LORD CHANCELLOR.—I have looked through the papers in this case, not from any doubt I entertained during the argument, but in order to see whether any thing suggested itself beyond what had struck my mind at the time it was discussed; the result, however, has only been to confirm the opinion I then formed, that there is no ground for impeaching this decree.

The claim is for an account of equitable waste committed by the plaintiff's father, while in possession of the family estates as tenant for life. An old family mansion-house was demolished, and a quantity of timber in the park, admitted, to a certain extent at least, to have been ornamental timber, was cut down.

Whether that was a judicious arrangement or not for [*123] the family, "it is quite immaterial to inquire, for a tenant for life has no right, whatever may be his opinion upon that point, to alter the nature of property belonging to another person; and therefore even admitting all that is alleged by the defendants as to that, the owner of the estate is entitled to be reimbursed the proceeds of that equitable waste. As to the general right, therefore, of the Duke to compensation for the waste committed upon his estate, there is no doubt; the only question is, whether any thing has occurred to deprive him of that right.

Several grounds were suggested for that purpose: First, acquiescence. Now, acquiescence is not the term which ought to be used. If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain.[1] That is the proper sense of the

[1] This principle has been recognized, that where a person having or claiming title to land, sees another execute a mortgage of it to a third person, without disclosing his title, or assents in any manner to the validity of the mortgage, he will not be allowed afterwards to set up his title to defeat such mortgage. *Lee v. Porter*, 5 John. Ch. R. 272.

A mortgagee, who knows that another is about to lend money upon the mortgaged premises, and denies that he has a mortgage, or asserts that it is satisfied, will not be preferred to a second mortgagee, who is induced to lend money by his concealment, or misrepresentation. *Lee v. Munroe*, 7 Cranch, 366 See also, *Taylor v. Cole*, 4 Mumf. 351; *Perine v. Dunn*, 3 John. Ch. R. 508.

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word acquiescence. In that sense, however, there is no acquiescence here, for the act was done when the present duke was a minor, and when if he had knowledge or means of knowledge—and he does not appear to have been of an age for that—nothing of acquiescence can be imputed to him. The defence, therefore, which is really intended to be set up, is not acquiescence, but release or abandonment of the party's right. For that purpose, however, it is not only necessary to show that the plaintiff knew of the acts of waste having been committed, but that he knew of the rights which they gave him against his father, and that having such knowledge, he did some act amounting to a release of that right. But the only evidence of knowledge on the part of the duke, that he had a claim of a pecuniary nature against his father in respect of these acts, is what took place during the negotiation between them for a settlement of their disputes. And if that negotiation had been carried *to a [*124] conclusion, and there had been any arrangement of property consequent upon it, the circumstance of the plaintiff's concluding that arrangement without bringing forward a claim which he knew to be outstanding against his father, might have been urged as a release of it. But the negotiation, in fact, ended in nothing; no arrangement of property was made as the result of it, and, therefore, the evidence only shows that at that time this claim was known to exist as one which the present duke might make against the property of his father. That cannot be said to amount to an abandonment or release of a previously existing equitable right.

Then as to compensation, that entirely fails; and therefore, it is not necessary to discuss what might or might not amount to compensation, by which I mean (because beyond that it cannot be argued,) the application, towards the improvement of the estate of the tenant in tail, of the proceeds of the equitable waste, either directly or immediately afterwards and arising out of the prior transaction; for there is not only no evidence of such application, but on looking at the answer, I find no such case even suggested.

Nothing, therefore, remains, but the question of time. That has been the point principally relied upon, and no doubt a great

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many years have elapsed since the waste was committed ; but mere lapse of time is nothing until you ascertain, by reference to the situation and circumstances of the parties, when it began to run against the title of the claimant. Now two periods were here suggested ; first, the time when the present duke attained twenty-one, which was, I think, in the year 1819. There is nothing whatever to show me that at that time he knew of his right : not that that is material, because where the statute [*125] table time has run, there is no exception *to it, whether the party knows of his right or not. But here the answer to the argument as to time is, that the property did not fall into possession until the year 1838, when the tenant for life, who committed the waste, died. Until that time, the plaintiff's right was a mere contingency ; if he had died before his father, it was gone ; and it was only on the death of his father that he became absolutely entitled, as tenant in tail, to the proceeds of that part of the estate which had been improperly converted into money by the tenant for life.

Now I in vain asked for authorities to show that, under these circumstances, a party whose estate becomes vested in possession on the death of the tenant for life, is to be barred of his equity if the tenant for life lives twenty years after the time when he committed the waste. No such case was produced—none certainly exists. The rule of law is quite the other way. The second, third, fourth and fifth sections of the statute 3 & 4 W. 4, c. 27, all apply more or less to the subject, and they all give to the tenant in tail his remedy from the time at which his estate vests in possession. Indeed, whether this case be considered as within the statute, or whether it is to be governed by the rule, that equity follows the law, it would be strange if, where an act of forfeiture has been committed by tenant for life, the tenant in tail is not bound to enter for the forfeiture, but may have twenty years from the time when his own estate vests in possession, and yet the moment you convert a legal right into an equitable right, that is to say, the moment you divert part of the estate from its proper purpose by an act of equitable waste, the tenant in tail should be barred by the lapse of twenty years from the time when the waste was committed. If equity is to

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follow the law, this court is bound to adopt the rule which "the statute has laid down, and to allow the [*126] same time for making a claim of this kind which the statute gives for making claim to the land itself.

Consistent with this is the rule as laid down by Lord Hardwicke, in *Kemp v. Westbrook*,^(a) and recognized by Lord Brougham in *Bennett v. Colley*,^(b) leaving no doubt upon my mind that this case is within the ordinary rule, that time does not begin to run against a tenant in tail until his estate vests in possession.

These are the only grounds in which this claim to compensation was resisted on the part of those who represent the estate of the tenant for life. I am of opinion that they all fail, and that the appeal must be dismissed with costs.

*WILLIAM McMAHON and WIFE v. BURCHELL and [*127]
another.[1]

1846: Dec. 4.

Mere occupation by one of several tenants in common of an estate, if unaccompanied by exclusion, does not make him liable for rent to his co-tenants.

Where at the hearing of a cause, an inquiry is directed, founded on a suggestion in the answer, it ought to be strictly limited to the specific case suggested.

Where an answer suggested that the plaintiff had for a certain time occupied a house of which he was tenant in common with several others, and that by virtue of such occupation, rent became due from him to those parties, and the bill was thereupon amended by charging that the plaintiff's occupation was not exclusive, and no further answer was put in: *Held*, that that suggestion did not warrant an inquiry whether the plaintiff had been in occupation of the premises during any and what time, and if so, whether he ought to be charged with any and what sum in respect of such occupation.

Every decree, though it merely directs inquiries, ought to contain a statement of the evidence on which it is founded; and therefore a decree reciting that certain evidence had been read, but that both parties consented that the entry of it should be

(a) 1 Ves. Sen. 278.

(b) 2 M. & K. 225.

[1] S. C. 3 Hare, 97; 5 Hare, 322.

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without prejudice to its admissibility, and thereupon directing certain inquiries, was held to be irregular.

Documentary evidence of confessions is not inadmissible merely because it is not specifically put in issue.

The executor of A. being sued for payment of a legacy, set up as a defence that the plaintiff had for several years occupied a house, part of an estate of which he and A., and other persons, were tenants in common under the will of B., and that A.'s share of the rent due from the plaintiff in respect of such occupation exceeded the amount of the legacy. *Semble*, the court will not, in a suit so framed, direct inquiries as to the plaintiff's liability for rent, or as to the amount due from him to A.'s estate in respect thereof, although the other parties interested in such inquiries be willing to be bound by them, but will decree immediate payment of the legacy in question without reference to the counter-claim.

THE plaintiff William M'Mahon being a legatee of £100, and his wife of £50 under the will of Anne M'Mahon the sister of William, they filed this bill against her executors for payment thereof. The defendants by their answer admitted assets, but insisted on a right to set off the amount of the legacies against a greater sum which they alleged to be due from the plaintiff William M'Mahon to his sister Anne's estate in respect of his proportion of occupation rent of a house at St. Kitts, in the Island of Barbadoes, of which William and his brothers and sisters, who were seven in number, were tenants in common, and which had been occupied for many years by the plaintiff and three of his brothers and sisters, not including Anne.

[*128] *The way in which the counter claim was raised by the answer, was as follows :—After stating that Terence M'Mahon, the father of William and Anne M'Mahon, by his will devised all the residue of his real and personal estate to his children absolutely as tenants in common, and that administration with the will annexed was shortly after the testator's death granted to the plaintiff William and his brother Charles, and that the testator's debts and legacies had been duly paid, and that the rents and profits of the house in question, being part of the residuary real estate, became divisible among the testator's seven children including Anne—stated that from the testator's death in 1811 down to 1830, the house had been occupied by the plaintiff William M'Mahon and his brother Charles, and his sisters Rebecca and Eliza, but for the greater part of that time by Wil-

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ham alone; and that by virtue thereof an occupation rent accrued due and payable from them to the parties beneficially entitled as aforesaid to the rents and profits of the house, but which rent was never paid or satisfied.

In a letter written by William M'Mahon in the year 1830 to his sister Eliza on the occasion of sending her his account as administrator, and which was referred to by the answer "as an admission by the defendant that rent was due from his brothers and sisters and himself on account of the occupation of the house," there was the following passage:—"I believe, indeed I am confident, it" (*i.e.* the accompanying account) "contains an account of every farthing that came to my hands of my father's property. If there are, as I think there must be, omissions, they are omissions against myself. . . . The only question now remaining to be settled relates to the lower house" (the house in question,) "the rent and expenses of which I have kept out of the account, because I cannot say what the rent ought to be, nor what the expenses [*129] amount to; although our poor Anne in writing to me in 1830, on behalf (as I thought) of her sisters as well as herself, declared she had not authorized Charles to make the demand he was then making upon me for rent, I do not consider this letter as releasing any claim the legatees may have upon the administrators for rent; I have therefore at the end of the account made a memorandum of the time the town house afforded an abode to those of my father's children that chose to reside in it, in order that with this information, and such other as I request you will procure from persons competent to give it, you may be enabled to say what the rent ought to be, and during what time the administrators ought to be charged with it."

The bill was afterwards amended, and, after suggesting, by way of pretence, the claim set up by the answer, it charged that the house was never occupied by the plaintiff William M'Mahon exclusively of his sister Anne and the other tenants in common thereof, or otherwise than with their sanction, and when necessary for the purposes of the administration. And it further charged, that if any rent was payable in respect of such alleged occupation, the same was a charge of administration, and an

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item in the account subsisting between William and Charles as the administrators, and Anne and the other children of Terence M'Mahon, as his residuary legatees, and ought not to be set off against the legacies claimed by the bill.

No answer was put in to the amendments, none being called for.

On the hearing of the cause before Vice-Chancellor Wigram, arrangements being made with the consent of [*130] *the defendants (the plaintiffs not opposing,) by which the other residuary legatees under the will of Terence M'Mahon might be bound by the decree, his Honor, after referring it to the Master to take an account of what was due for principal and interest in respect of the two legacies of £100 and £50, directed him to inquire whether the plaintiff, William M'Mahon, was, during any, and, if any, what time, in the occupation of the house in the pleadings mentioned, since the death of Terence M'Mahon; and, if so, whether he ought to be charged with any, and if any, what sums of money in respect of such occupation; and also, whether any thing, and what was paid, and when, since the death of the said Terence M'Mahon, by the plaintiff William M'Mahon, for or in respect of repairs and outgoings of the said house, or otherwise on account thereof; and whether at the death of the testatrix, Anne M'Mahon, there was in the hands of the plaintiff William M'Mahon, in respect of the said occupation, any, and, if any, what sum, liable to the payment or satisfaction of the said legacies, with liberty to state special circumstances.

The master proceeded upon the inquiries so directed, and made a report, to which the defendants took exceptions, and the cause was heard before the Vice-Chancellor Wigram upon the exceptions, and for further directions. The defendants having appealed from the orders then made, the plaintiffs presented a cross appeal from the original decree.

The appeal and cross appeal now coming on to be heard together, the Lord Chancellor desired that the cross appeal might be opened first.

Mr. James Parker and *Mr. Bagshawe*, for the appellants,

insisted that the counter-claim set up by the *answer [*131] was pleaded in such terms as, even if established by evidence, would not constitute any liability in the plaintiff; for that the mere occupation of premises by one of several tenants in common would not make him liable for rent to the rest, unless there were either exclusion, or some contract for the payment of rent; Co. Litt. sect. 322.; *Wheeler v. Horne* (a) and that, even if the answer had suggested a case of exclusion or contract, it would not have justified the inquiries, for that the mere pendency of an account from which a cross demand might arise was not a ground of set-off; *Rawson v. Samuel*, (b) *Dodd v. Lydall*, (c) more particularly in this case, where the account was one which could only be properly taken in a suit for the general administration of the estate of Terence M'Mahon.

Sir *Francis Simpkinson* and Mr. *Rolt*, for the respondents, cited *Henderson v. Easton*, (d) in which they said the Vice-Chancellor of England, referring to the 4 Ann. c. 16, s. 27, and the 3 & 4 W. 4, c. 27, s. 12, had held that mere occupation by one of several tenants in common made him liable for rent to the rest. They also referred, on the same point, to *Turner v. Morgan*, (e) in which case, however, there was ouster. But they further relied on the allegation in the answer, "That, by virtue of such occupation, rent accrued;" from which and from the letter referred to by the answer, they contended that, for the purpose at least of inquiry, it was to be presumed that the occupation had been such as to create a legal liability for rent.

"In support of this part of their case, they tendered in [*132] evidence, (as they had in the court below) two other letters from the plaintiff, William M'Mahon, to his brother Charles, as containing other admissions to the like effect, only more unequivocal than the former, but

Mr. *Parker* objected to those letters being received, on the ground that, being tendered as confessions of the plaintiff's liability, and not as evidence of a fact, they could not be admitted,

(a) *Wilkes*, 208. (b) *Cr. & Phill.* (c) 1 *Hare*, 333. (d) 10 *Jur.* 621.
(e) 8 *Ves.* 143.

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unless specifically put in issue by the pleadings, which they were not; *Fitzgerald v. O'Flaherty*,^(a) *Blacker v. Phopoe*,^(b) *Austin v. Chambers*.^(c)

[THE LORD CHANCELLOR.—In the case in the House of Lords, we did not go so far as you now contend for; but merely that the admission there tendered being a verbal one, though receivable in evidence, was not to be relied on; because a verbal admission was so easy to be misrepresented, that the plaintiff ought not to be bound by it without having an opportunity of explaining it.]

For the respondents, *Malcolm v. Scott*^(d) was cited.

[THE LORD CHANCELLOR.—That case states the rule which I have always acted on.]

Mr. *Parker*, in reply, observed that, even supposing the [*133] letters were technically receivable in evidence, *they merely contained admissions of liability, not stating any ground for it, and were evidently made under a mistaken notion of the law.

THE LORD CHANCELLOR.—How far the letters may bear upon the case, I cannot decide till I hear what they contain; but I cannot go the length of saying that evidence of an admission is not admissible merely because it is not put in issue.

The letters were accordingly received and read.

The respondent's counsel, in conclusion, contended that set-off was not the proper term, the case being one of retainer, and not of set-off: *Jefferies v. Wood*,^(e) *Ranking v. Barnard*,^(f) *Burridge v. Rowe*;^(g) and that the complexity of the account out of which the counter claim arose was no objection to its being

(a) 1 Moll. 352.

(b) Ibid. 358.

(c) 6 Cl. & Fin. 38.

(d) 3 Hare, 39, see p. 63; and see 1 Y. and Coll. 529, and 2 Moll. 394. n.

(e) 2 P. Wms. 128.

(f) 5 Madd. 22.

(g) 1 Y. & Coll. C. C. 183.

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a subject of retainer or even of set-off; *Cherry v. Boulton*,^(a) *Courtenay v. Williams*;^(b) and, lastly, that the wife's legacy was subject to the right of retainer, as well as the husband's; *Ex parte O'Ferrall*.^(c)

THE LORD CHANCELLOR.—With all deference to the Vice-Chancellor Wigram, I cannot think there is any case in these pleadings for inquiry.

The bill is for a legacy under the will of Anne M'Mahon. The answer states, that the plaintiff and Anne were two of the children of Terence M'Mahon, *who had [*134] several other children, and who devised his property, real and person, including the house in question, equally between them all; and that the plaintiff occupied the house, and, by virtue of that occupation, became liable for rent. It also notices, that William was one of the administrators of that estate; but in that character he had nothing to do with the house, which was freehold. After that answer was put in, the bill was amended, and the amendment put directly in issue the fact that the plaintiff's occupation of the house was not an exclusive occupation. No further answer was put in.

The result is, that there is this direct issue between the parties; the plaintiff says, I occupied the house as tenant in common; the defendant only says, you did occupy, and in respect of such occupation rent became due. On these statements on the one side, and on the other, issue is joined. The defendant cannot, therefore, go out of that issue, but must abide by the case made by the answer, which he has not availed himself of the opportunity of amending by any further answer, and I must, therefore, take it, that he means to raise this proposition, that the fact of the plaintiff having occupied the house not in entirety, but as a tenant in common, makes him liable to his co-tenants.

A case has been referred to, in which the Vice-Chancellor of England is represented to have so decided; [1] but I cannot think

(a) 4 My. & Cr. 442.

(b) 3 Hare, 539.

(c) 1 Gl. & Jam. 347.

[1] *Henderson v. Edson*, 10 Jurist, 821. S. C. reported 3 Phillips, 308.

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that the Vice-Chancellor can have laid down any such doctrine; for the effect would be, that one tenant in common, by keeping out of the actual occupation of the premises, might convert the other into his bailiff; in other words, prevent the other from occupying them, except upon the terms of [*135] paying him *rent. There is nothing in the Acts of Parliament(a) to lead to that conclusion, which is contrary to the law as clearly established from the time of Lord Coke downwards. I cannot think, therefore, that the Vice-Chancellor intended to lay down such a proposition. Indeed, it has hardly been contended for at the bar; for the argument has been, that there is enough in the answer to raise a claim to rent which may have arisen in some other manner. There may, no doubt, be various modes of occupation, which would make the party occupying liable for rent to the other tenants in common; but there is nothing in these pleadings to entitle the defendant to an inquiry, whether the plaintiff's occupation was in one of those modes, beyond the statement in the answer to which I have referred.

An inquiry of this kind is an indulgence, when the defendant does not prove his case but suggests one which the court thinks ought to be investigated, in order to enable it to do complete justice between the parties: but then the party ought to be strictly bound by the case which he does suggest, and, therefore, if he states merely that rent became due by virtue of occupation, he cannot be allowed to establish that case by proof of an agreement, for if there was an agreement there would be a title to rent, whether the party occupied or not.

But even if that were not so, and that the party, whether at the hearing or before the master, were entitled, upon this answer, to go into proof of a right to rent by agreement, my opinion is, that the evidence does not establish such a case. It consists of certain letters written by William to other [*136] members of the family, in which a *supposed liability for rent is alluded to, but in no part of which is there any reference to an agreement; so far from recognizing any

(a) 4 Ann. c. 16, s. 27, and 3 & 4 W. 4, c. 27, s. 12.

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agreement, it is quite clear from the letters, that the amount of rent was uncertain ; whereas, if any agreement to pay rent had been made, the amount of the rent would necessarily be a part of the agreement, or, at least, he would have said, I will pay a reasonable rent ; but there is no trace of any thing of the kind in the correspondence. There are merely expressions indicating an idea in William's mind, that he was liable to rent, and I cannot be much surprised at that, when I find that the answer seems to take that for the rule of law, and when I am told that it has been so laid down in one of the branches of this court.

But there is another objection to these inquiries. The court is not in the habit of referring it to the master to inquire as to legal liability, when all the facts from which that liability is to be inferred are before the court. If the court meant to decide that a tenant in common was liable for rent, in respect of occupation merely, why did it not so decide, without sending the question to the master ? For it is to be observed, that the reference does not direct the master's attention to any circumstances of the occupation or any agreement ; the inquiry is merely whether the party was in occupation, (though there is no dispute about the fact of occupation,) and whether he was liable for rent ; the latter being a mere roving inquiry founded on a loose statement in the answer, and leaving it open to the defendant to make any possible case that might turn up. I do not apprehend that to be a proper course in directing inquiries ; it is leaving the whole case, law as well as fact, to the master. When an inquiry is, by the practice or indulgence of the court, directed, it should be very strictly confined to the *case [*137] suggested by the answer, and should not leave it open to the party to make an entirely new case before the master.

Another observation is that these inquiries are not directly between the plaintiff and the estate out of which the legacy is to be paid, but between him and another estate, in which a number of other parties are interested, some of whom are not parties to this suit, but whose consent was necessary to these inquiries. If either the estate of Anne or the estate of Terence has any claim upon the plaintiff, it may be made available in some other manner ; but I cannot think that in a suit framed as

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this is—a suit merely for the payment of these two legacies—it can be right to involve the plaintiffs, claiming them, in these inquiries.

I think, therefore, that the decree ought to be altered by omitting the reference as to the rent.

I must also take this opportunity of saying that I never will permit a decree to pass through my hands drawn up in the way in which this is ;(a) on which it does not appear what the evidence was which was before the court, or what was the ground on which the reference was sent to the master. Evidence is received without any adjudication as to its admissibility.

[*138] It is all received here, and left to the master to "decide whether it is admissible or not. First of all, the recital is, "And both sides consenting that the entry of the foregoing evidence is to be without prejudice to the admissibility thereof,"—there being no other notice taken at all of what the evidence is, except what precedes,—"on opening the matter and hearing a certain paper of admissions signed by the solicitors on both sides, and the several documents therein referred to, read ;" so that, if that paper should by chance be lost, nobody could trace what the court had before it. The decree does not inform this court, or any other court before whom the matter might be brought, what the evidence was ; it refers to a paper, which paper is perfectly useless, except for the purpose of the hearing, in order to ascertain what the parties have agreed to. When the decree is pronounced, it is on a paper of admissions, which are not admissions of fact, but only admissions of certain documents : the documents themselves are not set out ; it is only to be ascertained what they were by reference to the paper which is referred to in the decree, but not incorporated in the decree, and which is, therefore, not preserved as a record. But the greatest defect of all

(a) The part of the decree to which these remarks referred, was as follows :

This cause coming on, &c., upon opening and debate of the matter and hearing a certain paper of admissions signed by the solicitors on both sides, and the several documents therein referred to, and the defendants' answers read, and what was alleged by the counsel on both sides, and both sides consenting that the entry of the foregoing evidence is to be without prejudice to the admissibility thereof, or of any part thereof, this court doth order, &c.

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is to the reservation, that the entry of the foregoing evidence is to be without prejudice to the question as to the admissibility of the evidence.

The decree must be corrected by stating what the documents were which were in evidence before the court, and by the omission of that reservation of the admissibility of the evidence, which I suppose is intended to be left open before the master; whereas, if the evidence was tendered at all before the court, the decree ought to have taken notice of it, either as admitted or as rejected; and, of course, if rejected, it would no longer form part of the evidence on which the court proceeded.

"I am the more anxious that this should be done, be- [*139] cause it is not by any means the first case in which, within very modern times (for it is a new practice to me,) I have found decrees drawn up in that manner. It is high time, as it is likely to grow into a practice, that it should be checked, and that we should again resort to the strict mode of drawing up the decrees of the court, from which it may be known on what ground they proceeded. We had a case in the House of Lords where the same sort of thing was done, and which certainly did not meet with the approbation of any of the learned Lords who attended the hearing.

The decree, as altered, will be, for the payment of the two legacies, with costs up to the hearing.

As to the costs of the proceedings subsequent to the hearing, *Mr. Parker* said he was satisfied with the order on further directions, which gave the plaintiffs those costs: and that although that order would fall with the reversal of the decree, yet, as his clients had been right throughout, it was reasonable that they should still be allowed them.

THE LORD CHANCELLOR.—Where expenses have been incurred owing to a mistake of the court, no costs are given on either side: and therefore I do not see how I can give any costs of the subsequent proceedings. It may be that the plaintiffs are losers by having succeeded in their appeal from the original de-

1846.—*M'Mahon v. Burchell.*

cree ; but I cannot, on that ground, break through the established practice of the court.

[*140] **LAWRENCE v. BOWLE* and another.

1846 : Dec. 4.

Where several defendants are involved in a breach of trust, the court, in decreeing relief in respect of it, decrees the costs of the suit against them all, on the principle of giving the plaintiff the greater security for the payment, and without regard to the relative degrees of culpability in the defendants.

THIS was a suit instituted on behalf of the infant son of an intestate, for the purpose of getting in and securing a portion of the estate which had been left for some years outstanding in the hands of the defendant Bowle under a contract between him and the other defendant, the mother of the plaintiff, who was administratrix, and which contract was treated by the decree as a breach of trust.

The cause was heard in last term before the Lord Chancellor, and, by the minutes as delivered out by the registrar, the costs of the suit were decreed to be paid by the defendant Bowle alone.

The minutes now coming on to be spoke to,

Mr. *Roupell* and Mr. *G. Russell*, for the defendant Bowle, insisted that the costs of the suit ought to have been ordered to be paid by the plaintiff's mother as well as by their client.

That was resisted by Mr. *Cooper* and Mr. *Cooke*, for the plaintiff, and by Mr. *Stuart*, for the mother, on the ground that, though the court had treated the transaction between the two defendants as a breach of trust, yet, from the circumstances of it, as they appeared, the defendant Bowle was much the more culpable of the two.

THE LORD CHANCELLOR said—That the question was not

1846.—Lawrence v. Bowle.

whether one of the defendants was more culpable *than the other, but whether the infant plaintiff was to [*141] be deprived of the double security which a decree for costs against both the parties by whom his estate had been endangered, if not wasted, would give him. Both the defendants were implicated in the breach of trust, and both ought, on the record at least, to be liable for costs; and the decree should, therefore, be in the common form—the costs to be paid by both the defendants.

STOCKEN v. DAWSON.

1846: Dec. 8.

Every exception to a report ought to tender some proposition on which the court may decide.

The simple allowance of an exception by the court, unaccompanied either by an express declaration or a reference back to the Master, implies an adoption by the court of the proposition tendered by the exception.

UPON the argument of exceptions to a master's report, one of which was, that the master in taking a certain account had found a certain aggregate sum due, "whereas the master ought to have found a less sum due."

THE LORD CHANCELLOR observed.—That all exceptions ought to tender some proposition on which the court might decide, and that he did not see how the court could decide any thing upon an exception so framed.

Another exception, after stating what the Master had done respecting a certain subject-matter of reference, submitted, in a long proposition, what he ought to have done.

The exception having been allowed by the court below, a question was, on further directions, raised by *Mr. [*142] *Bethell*, for the appellant, whether the allowance of such an exception necessarily implied that the court adopted the specific proposition which the exceptant suggested.

1846.—*Stocken v. Dawson*.

THE LORD CHANCELLOR.—There are two courses which may be taken upon exceptions. One is to allow the exceptions, and refer it back to the Master to review his report, which is equivalent to saying—You have done wrong, try again. But when the report is not sent back, but the exception merely allowed, if the court does not make any express declaration of its own, it must be taken to have adopted the proposition tendered by the exceptant; otherwise the question would not be disposed of, for, by the supposition, it is not to go back to the Master.

FINDEN v. STEPHENS.

1846: Dec. 10, 11.

A direction in a will, that a certain person should be employed as agent and manager of the testator's estates whenever his trustees should have occasion for the services of a person in that capacity, *held* not to create a trust which such person could enforce.

THIS was an appeal from an order of the Vice-Chancellor of England, overruling a general demurrer to the bill, which prayed a declaration, that the plaintiff was entitled to be appointed the agent, receiver, and manager of all the estates devised by the testator's will in respect of which the trustees of the will might have occasion for an agent, receiver, or manager, according to the provision for that purpose contained in the will, and that the plaintiff might be permitted to act as such agent, &c., and be allowed to retain out of the rents of such estates the usual fees payable to receivers, the amounts thereof, if necessary, [*143] to be settled by the *Master, and that the defendant might be restrained by injunction from appointing or permitting any other person to act as such agent &c. in the place of the plaintiff.

The bill stated that the plaintiff had been employed by the testator for many years previously to his death in 1845 as his surveyor and architect, and as his general adviser in the letting and management of various parts of his estates and property at Reading, and that the testator had reposed great confidence in

1846.—Finden v. Stephens.

his judgment and integrity in those capacities. It then set forth the testator's will, dated the 28th March 1845, by which he devised all his real and personal estates to two of the defendants in trust, subject to an annuity of £1000 to his wife for her life, to pay the income in equal shares to his wife's four nieces (naming them,) to their respective separate use, with power to them to appoint the reversion of their respective shares, and subject to any appointment to be made by them, or any of them, in trust for Anne Frances Quelch (one of the nieces) absolutely. The will then contained a power to the trustees, with the consent in writing of the four nieces, to lease or sell all or any part of the estates, and to give effectual discharges for the purchase-money and a power to the four nieces, or the survivors or survivor of them, to appoint new trustees. And then came the following clause on which the plaintiff's claim was founded :—
“ And inasmuch as my estates and property will require more management than I can expect of my trustees personally to bestow, it is my wish and desire that Thomas Finden of Upper John Street, Fitzroy Square, architect and surveyor, in whose judgment and integrity I place great confidence, be appointed for all purposes for which they or he, my trustees and trustee, may have occasion *for an agent, receiver, or [*144] manager of all or any of my estates and property ; and in case the said Thomas Finden shall die, or desire not to act, or to act further in the said office, then it shall be lawful for my said wife's nieces, and the survivors and survivor of them, to appoint some other person to act in the place of said Thomas Finden, and, so from time to time as often as it shall be necessary ; and after appointing the defendants his executors, the testator declared that they and every other trustee to be appointed as aforesaid, and also the said Thomas Finden, and the person or persons to succeed him, should only be answerable for such property, rents, profits, dividends, and money respectively, as they respectively should actually possess and receive, and each only for the property and monies which he might possess and receive, and for his own wilful acts, neglects, and defaults only, and not further or otherwise.”

The bill set forth a correspondence between the trustees and

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the plaintiff and other persons, as containing admissions on the part of the trustees, that an occasion had arisen for the employment of some person in the character of receiver or manager as to part of the estates; and it charged that the defendants threatened and intended to appoint or employ some other person to be the agent or manager of the testator's property in the place of the plaintiff.

The appeal now coming on to be heard,

Mr. *Stuart* and Mr. *Bazalgette*, for the appellants, relied upon *Shaw v. Lawless*.(a)

Mr. *Bethell* and Mr. *Boyle* for the respondent.

[*145] *The present case has more resemblance to that of *Friswell v. Moore*(b) than to *Shaw v. Lawless*. In the latter case, the party claimed a right to act, whether the devisees wanted his assistance or not—to remain an incubus on the estate all his life; and that claim the court considered, and rightly, as inconsistent with the other provisions of the will. But here all that the plaintiff claims is a right to be employed whenever the trustees have occasion for the services of a surveyor and manager. That does not interfere with the powers of the trustees; if they sell the estate, they will, of course, have no further occasion for such services; the plaintiff does not claim an interest in the estate as the plaintiff in *Shaw v. Lawless* did, but merely seeks to compel the defendant to do an act which the testator has directed them to do, and which, when done, will entitle him to a pecuniary benefit.

[THE LORD CHANCELLOR.—In that respect the two cases are the same; for it is only on the ground of some pecuniary interest that the plaintiff can sustain the suit at all. Suppose a testator says by his will, I have great confidence in such and such a person, and I direct that if my devisees have any difficulty in the management of my estates, they shall go to that person for advice, saying nothing about remuneration. Could that person

(a) 5 Clk. & Fin. 129.

(b) Cited 5 Clk. & Fin. 142.

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file a bill? I put the case merely for the purpose of showing how the matter would stand, independently of the claim to pecuniary benefit. The suit has more resemblance to a Scotch action of declarator than to any proceeding known to our law, as it seeks an adjudication upon a right which has not yet arisen; for it is for the trustees to say when *a necessity [*146] exists for the employment of a receiver or manager; and until they actually appoint some one in that character, *non constat* that in their opinion, such a necessity has arisen.]

The correspondence shows that, and the demurrer admits it; and if there be any difficulty as to a prospective declaration of right, the plaintiff is, at all events, entitled to the preventive remedy by injunction, on the principle of *quia timet*.

Mr. Stuart in reply.

Dec. 11th.—THE LORD-CHANCELLOR.—The great caution which I think it my duty to exercise in all cases on which I have the misfortune to differ from the opinion of other judges of this court, induce me, notwithstanding the strong opinion I entertained at the hearing, to abstain from acting upon that opinion, until I had an opportunity of examining the case of *Shaw v. Lawless*, and the judgment of the Vice-Chancellor in this case. The result has been, a confirmation of my first impression. I think, indeed, that the present falls within all the principles of *Shaw v. Lawless*, and is a much stronger case against the claim. In *Shaw v. Lawless*, the question was stated to be whether the words used amounted to a trust, or only to an expression of opinion and advice; and the provisions of the will were examined, in order to ascertain which of these was to be considered as the intention of the testator; and it was shown, that to consider the words as a trust, would be inconsistent with other provisions of the will, and therefore the construction was adopted of *considering the words [*147] only as words of recommendation and advice.

Nearly all the observations made on pursuing the inquiry in that case apply to the present. The testator gives his property to trustees, who, until the death of the survivor of the wife and

 1846.—Finden v. Stephens.

her nieces, were to act in the management of the estate, with powers of leasing and selling. To them, with the consent in some cases of the *cestui que trusts*, he looked for the due performance of those duties. Is it consistent with this purpose, that he should give to the plaintiff an irrevocable office of agent, receiver, or manager? If the nomination of the plaintiff amounted to a trust, then it gave to him the character of a *cestui que trust* to the amount of his per centage upon the receipts; in respect of which he would be entitled to those rights of interference and control which belong to all *cestui que trusts*. In *Shaw v. Lawless* it was asked, whether the plaintiff could have been intended to have a right of interfering in the trust for investing personalty in land: so in this case it is asked, whether the plaintiff was entitled to interfere with the discretion of the trustees, and the wishes of the widow and nieces, in exercising the powers of sale. It would be useless to pursue the comparison further, for there is scarcely a ground of the decision in *Shaw v. Lawless* which does not apply to this case; but there are many objections to the plaintiff's claim in this case, which did not exist in *Shaw v. Lawless*.

The appointment is admitted to be optional in the trustees, and if the plaintiff should die or decline, the nieces would have the power to appoint some other person, which person, when appointed, would have the same right as the plaintiff; [*148] but this proves, to demonstration, "that the object was not so much a benefit to the plaintiff, as securing for the estate what the testator thought a good plan of management.

There are, however, other objections to this bill. The plaintiff has not, and does not pretend to have, any present interest, but claims only to be employed as and when the trustees may have occasion for an agent, manager, or receiver; but words of recommendation are never construed as trusts, unless the subject be certain; [1] besides which, it is not the practice of equity to en-

[1] As to effect of words of recommendation or request, see *Padmore v. Gunning*, 7 Sim. 644; *Ford v. Fowler*, 3 Beavan, 146; *Pope v. Pope*, 10 Sim. 1; *Knight v. Knight*, 3 Beavan, 148, 172, 174; *Brunson v. Hunter*, 2 Hill Ch. R. 490; *Hart v. Hart*, 2 Deane 83; *Van Dyck v. Van Buren*, 1 Cal. 84; *Brost v. Offley*, 1 Ch.

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ertain suits on behalf of parties who have only the possibility of a future title, upon events which may never happen—which are the words of Lord Redesdale in p. 127, of his third edition. Bills *quia timet* are no exception, because they are to guard against events which may affect existing rights or liabilities. The bill is equally unsustainable upon the ground of the injunction prayed, for the act sought to be restrained would not only not prejudice the plaintiff, but actually be a benefit to him, so far as to enable him to raise the question, which he has by this bill prematurely raised. I think, therefore, that the demurrer ought to have been allowed.

Order reversed.

 *PENNY v. WATTS.

[*149]

1846: Dec. 11.

On a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix deceased: *Held*, that an allegation that all the testator's debts, and the other legacies bequeathed by his will, had been paid, and that there were assets *ultra* in the hands of the defendant so satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator; the allegation being one which, even if admitted by the defendant, the court would not take his word for.

The absence of a necessary party to any part of the relief prayed by a bill, though the prayer be in the alternative, is a good objection on demurrer.

R. 246; *Brown v. Higge*, 8 Ves. 590; *Harwood v. West*, 1 Sim. & St. 387; *Wood v. Cox*, 2 Mylne & Cr. 864; *Knott v. Cottee*, *post*, p. 192. But where the objects of the trust are too indefinite to afford any certainty, the court will not enforce it as a trust; see *Stubbs v. Sargon*, 2 Keene R. 255; S. C. 3 Mylne & Cr. 507; *Ommaney v. Butcher*, 3 Turner & Russell, 260; *Ford v. Fowler*, 3 Beavan, 144. See 2 *Story on Equity*, sec. 1069, and cases cited in note 2 to sec. 1070. Though "recommendations" may, in some cases, amount to a direction, and create a trust, yet that being a flexible term, if such a construction of it be inconsistent with any positive provision in the will, it is to be considered a recommendation, and nothing more. Thus, in *Shaw v. Lawless*, 5 Clark & Finley, 129, the House of Lords held, that where the interest supposed to be given to the party recommended, was inconsistent with other powers which the trustees were to exercise, and those powers given in unambiguous terms, as the two provisions could not stand together, the flexible term was to give way to the inflexible term. See *Knott v. Cottee*, *post*, 192.

1846.—Penny v. Watts.

An allegation that the defendant, being the person entitled to take out representation to a deceased party, refuses to apply for it, and impedes the plaintiff in procuring a grant of it to any other person, is not a sufficient answer to a demurrer founded on the absence of such representative; but *secus* if the bill alleges that the grant of representation is actually in litigation in the ecclesiastical court.

THIS was an appeal from an order of the Vice-Chancellor of England, overruling a general demurrer for want of equity and for want of parties.

The bill stated the will of one Charles Unett, dated in the year 1822, by which, after giving several pecuniary legacies, including one of £2000, to the plaintiff's late wife, he devised all his real estate and bequeathed his residuary personal estate, to his wife Rebecca absolutely, and appointed her sole executrix. It then stated that Rebecca Unett proved the will, and that, on the 29th September, 1835, just before the marriage of the plaintiff with his late wife, an agreement was entered into between her and Rebecca Unett that, in consideration of the former relinquishing her legacy, which had not been paid, the latter would, either during her lifetime, or by her will, settle the testator's real estates in the county of Salop, in such a manner that upon her death, they should vest in the plaintiff and his wife and their heirs. It then stated that Rebecca Unett had, in 1843, intermarried with the defendant Watts, and had, on that occasion, conveyed those estates, amongst others, to him, in fee, with notice of the agreement; and that she had died in April, 1846, without having made any settlement of the estates in conformity therewith. It further stated that, in an answer [*150] put in by Watts to a former bill filed against him by the plaintiff, and to which this bill was in part supplemental, he had admitted, as the fact was, that the whole of the personal estate of the testator had been received by himself and Rebecca, his wife, or one of them, and that no part thereof remained to be got in or administered; and the present bill charged that all the testator's funeral and testamentary expenses and debts, and all the legacies bequeathed by his will, except the legacy of £2000 to the plaintiff's late wife, had been fully paid and satisfied, and that the defendant on his said marriage possessed himself of the whole of the testator's personal

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estate then remaining undisposed of or unadministered, and which was to an amount more than sufficient to answer the legacy of £2000, and had converted the same to his own use. It further stated that, on the death of the defendant's late wife, no settlement of her personal estate having been made upon her marriage, the defendant became entitled, in his marital right, to, and had, in fact, possessed and converted to his own use, all her personal estate.

The bill further charged that there was now no legal personal representative either of the testator or of Rebecca Watts; and that the defendant Watts, being the person entitled to the grant of administration of both those estates, declined to apply for such grants, or to renounce his right thereto, and that he thereby impeded the same being granted to any other person with a view to prejudice the plaintiff.

The bill prayed that the plaintiff might be declared entitled to the benefit of the agreement of the 29th September, 1835, and that the defendant Watts might be decreed specifically to perform the same, and to convey the estates comprised therein to the plaintiff in fee simple; and that if for any reason the plaintiff should *not, in the judgment of the court, [*151] be entitled to such relief, then that he might be declared entitled as administrator of his late wife to the said legacy of £2000, and that an account might be taken of what was due for principal and interest in respect thereof, and that the defendant might pay to the plaintiff what should be found due thereon; or, in case the court should not be of opinion that the defendant had admitted or was bound to admit, and if he should not admit, assets of the testator come to his hands sufficient for the purposes aforesaid, then that all such accounts and inquiries as might be necessary and proper for the purpose, and according to the frame, of this suit might be taken and made, in order to ascertain what personal estate of the testator had been possessed and received by the defendant, or by his order or for his use, and of the liabilities, if any, in respect of debts and legacies in addition to the said legacy of £2000 which the same was subject, and of the application of the same, and that the defendant might be decreed thereout, or to the extent of the amount and

 1846.—Penny v. Watts.

value thereof, to pay to the plaintiff what should be found due to him as aforesaid.

The ground of the demurrer for want of parties was, that there was no personal representative either of the testator, or of Mrs. Watts, before the court.

THE LORD CHANCELLOR having, upon the opening of the appeal, expressed a clear opinion that the general demurrer for want of equity could not be sustained, the rest of the argument was confined to the demurrer for want of parties.

Mr. *J. Parker* and Mr. *Bird*, for the appellant, said that the ground on which the Vice-Chancellor had overruled the [*152] demurrer was that, if the plaintiff should *succeed at the hearing on the first branch of his case, the absent representatives would not be necessary parties.

[THE LORD CHANCELLOR.—If absent parties be necessary for any part of the relief prayed, it is an objection on demurrer.]

Mr. *Rolt* and Mr. *Bazalgette*, for the respondents:—The result of the statements in the bill, which for the present purpose must be taken to be true, is that the legacy claimed by the plaintiff is the only one remaining unpaid, and that the defendant Watts has possessed himself of assets of the testator remaining unadministered, to an amount more than sufficient for the payment of that legacy. If that be so, he is under a personal liability to pay it; *Tyler v. Bell*.(a) If not personally liable, he is at all events, in respect of these surplus, an executor *de son tort*, and liable in that character to the plaintiff.

[THE LORD CHANCELLOR.—If the estate is to be administered, the executor *de son tort* being here will not dispense with a regular representative: he is only treated as executor for the purpose of being charged, not for any other purpose.]

Admitting that a regular representative will be a necessary

(a) 2 My. & Cr. 106.

1846.—Penny v. Watts.

party at the hearing, what is alleged as to the conduct of the defendant in preventing the plaintiff from obtaining such representation is a sufficient answer to the objection in this stage of the suit; for it would be a great hardship on the plaintiff, if he were to be precluded from even filing a bill until he can overcome the "obstacles interposed by the defendant himself" [*153] in the way of his obtaining such a representation to deceased parties as will make his suit complete.

[THE LORD CHANCELLOR.—You ask such accounts only as may be necessary for the case made by the bill. What accounts do you refer to?

An account of what the defendant has himself received, in order to show that he has actually received this legacy. It being admitted by the demurrer that all the debts and the other legacies have been paid, the only thing the plaintiff has to show is, that the defendant has received assets *ultra* sufficient to satisfy the plaintiff's demand.

THE LORD CHANCELLOR.—I wish the practice would enable me to dispense with these parties; for it is very likely that the bringing them before the court will merely occasion useless expense. But I have only to look at the statements of the bill to see whether the court can give the plaintiff the relief which he asks without an administration of the estate; if it cannot, it follows of course that the objection for want of parties must be allowed.

The bill states, it is true, that all the debts and the other legacies have been paid; but these are allegations which can only be proved by inquiries before the master: even if the defendant admitted them, the court would not take his word for it. If indeed a sum had been separated from the mass of the personal estate to answer this legacy, and had got into the hands of the defendant, the court would decree payment of it to the legatee without involving him in the general accounts "of the estate; but no such case is made by this bill: [*154] the only allegation is, that assets have been received by the defendant sufficient to enable him to pay this legacy, and

 1846.—Penny v. Watts.

on that allegation the court cannot dispense with the presence of the personal representative. Therefore the demurrer for want of parties must prevail.

With respect to the excuse alleged for not bringing the personal representative here, the answer is, that the plaintiff might, if he had chosen, have taken a course which would have obviated the objection; for if he had instituted a suit in the Ecclesiastical Court for a grant of administration, a *lis pendens* there, if stated in the bill, would have saved the demurrer. But he alleges nothing—no steps taken—to obtain representation. Therefore I must allow the demurrer, with leave to amend by adding parties.

SPOTTISWOODE v. CLARKE.

1846: Dec. 11.

Principles which ought to regulate the exercise of the jurisdiction by injunction:

THIS was an application to discharge an order made by the Vice-Chancellor of England, restraining the defendant from selling or exposing for sale any almanacks bound in wrappers or covers, with the title "Pictorial Almanack" printed thereon, or having any other title printed thereon, so as, by colorable representation or otherwise, to represent the almanack published and sold by the defendant to be the same as the almanack printed and sold by the plaintiff for the year 1847; with a direction that the plaintiff should forthwith bring an action against the defendant for the alleged colorable imitation of his wrapper.

[*155] *A specimen of each of the almanacks was produced.

Both had engravings, but different ones, in the centre of the wrapper. And on both there was a description of the work printed in large letters above and below, and on the sides of the engraving.

1846.—*Spottiswoode v. Clarke.*

The description of the plaintiff's work was

THE PICTORIAL ALMANACK,
FOR 1847.

Price 6d.

GREENWICH
ASTRONOMICAL

ROYAL
CALENDAR.

AND
YEAR BOOK
FOR

THE GARDENER, FARMER, NATURALIST, AND MAN OF
BUSINESS.

The description of the defendant's work was

OLD MOORE'S FAMILY
PICTORIAL ALMANACK,
FOR 1847.

GREENWICH ROYAL
ASTRONOMICAL CALENDAR
AND YEAR BOOK FOR THE
GARDENER, FARMER,
SPORTSMAN, NATURALIST,

THE MAN OF BUSINESS,
THE HOUSEWIFE,
A FAITHFUL COMPANION
FOR ALL TIMES AND
SEASONS.

The only other points of difference between the wrappers were, that the defendant's was smaller than the plaintiff's, and was colored yellow, while the plaintiff's was white.

Mr. *Stuart* and Mr. *Moore* appeared for the appeal motion.

*Mr. *Anderdon* and Mr. *Hallett*, *contra*. [156]

Millington v. Fox, (a) *Knott v. Morgan*, (b) *Croft v. Day*, (c) *Perry v. Truefitt*, (d) were cited.

THE LORD CHANCELLOR.—All these cases depend upon their

(a) 3 My. & Cr. 338.

(b) 2 Keen, 213.

(c) 7 Beav. 84.

(d) 6 Beav. 66.

own circumstances, and all that the court can do is to lay down the principles upon which it acts, in order that parties may know what measure of relief they have to expect in any particular case.

I have often expressed my opinion, that, unless a case of this kind, depending upon a legal right, is very clear, it is the duty of the court to take care that the right be ascertained before it exercises its jurisdiction by injunction.

The first question to be determined is as to the legal right, and if the court doubts about that, it may commit great injustice by interfering until that question has been decided.

One objection to that course is, that it compels future litigation, for it orders the plaintiff to bring an action; whereas, by adopting the alternative course—suspending the injunction, with liberty to the plaintiff to bring an action—it enables him to pause a little and consider whether it is worth his while to embark in such a course of litigation as will be necessary to establish the right on which he insists.

[*157] *A second objection is, that the court in granting the injunction is expressing a strong opinion upon the legal question, before that question is discussed in the proper tribunal. It is much better, if the legal right is to be litigated, that this court should abstain from expressing any opinion upon it in the mean time.

But the greatest of all objection is, that the court runs the risk of doing the greatest injustice in case its opinion upon the legal right should turn out to be erroneous. Here is a publication, which, if not issued this month, will lose a great part of its sale for the ensuing year. If you restrain the party from selling immediately, you probably make it impossible for him to sell at all. You take property out of his pocket and give it to nobody. In such a case, if the plaintiff is right, the court has some means, at least, of indemnifying him, by making the defendant keep an account; whereas, if the defendant be right, and he be restrained, it is utterly impossible to give him compensation for the loss he will have sustained. And the effect of the order in that event will be to commit a great and irremediable injury. Unless, therefore, the court is quite clear as to what

 1846.—*Spottiswoode v. Clarke.*

are the legal rights of the parties, it is much the safest course to abstain from exercising its jurisdiction till the legal right has been determined.[1]

In the course of the argument cases of trade marks were referred to: but trade marks have nothing to do with this case.[2] Take a piece of steel: the mark of the manufacturer from which it comes is the only indication to the eye of the customer of the quality of the article: so it is of blacking, or any other article of manufacture, the particular quality of which is not discernible by the eye. But these cases are quite different from the present case, in which if you are deceived at all, it is not "by the eye." [3] The size, the color, the engraving [158] are all different in the two works, so that no one who sees the two could mistake the one for the other. At the same time I must say, that there is in the descriptions given of the two works a very remarkable coincidence of ideas in the plaintiff and defendant, if the two wrappers be supposed to have been designed independently of each other. It is difficult to believe that that was pure accident; though if any fraud was intended, it certainly was a very clumsy one.

I am not, however, so satisfied that this is a case in which the plaintiff has a legal right against the defendant as to justify me in restraining the latter from the sale of his work, until that right has been established in the proper tribunal.

Therefore, the injunction must be dissolved, the defendant keeping an account, and the plaintiff to be at liberty to bring an action.

[1] See *Partridge v. Menck*, 2 Sandf. Ch. R. 622.

[2] For cases on the subject of trade marks, see *Coates v. Holbrook*, 2 Sandf. Ch. R. 586, and note, page 599; *Lewis v. Langdon*, 7 Sim. 421; *Pidding v. Howe*, 8 Sim. 477; *Perry v. Treuffit*, 6 Beavan, 66; *Croft v. Day*, 7 Beavan, 84; *Partridge v. Menck*, 2 Sandf. Ch. R. 622; *Taylor v. Carpenter*, 11 Paige, 292; *Bell v. Lock*, 7 Paige, 75; *Knott v. Morgan*, 2 Keene, 213; *Wellington v. Fox*, 2 Mylne & Cr. 338; *Taylor v. Carpenter*, 7 Law Rep. 437.

[3] In a suit to restrain the use of trade marks alleged to be simulated, if it appear that the marks used by the defendants, though resembling the complainants in some respects, would not probably deceive the ordinary mass of customers, paying the attention which persons usually do in buying the article in question; an injunction will not be granted. *Partridge v. Menck*, 2 Sandf. Ch. R. 622.

 1846.—*Smith v. Guy*.

[*159]

*SMITH v. GUY.

BRUNWIN v. GUY.

1846: Dec. 7.

The court will not, on the ground of irregularity in a decree in a creditor's suit, take the conduct of the suit from the plaintiff and give it to another creditor, though collusion be suggested.

Where decrees had been obtained in two creditors' suits for the administration of the same estate, the court ordered that the plaintiff in the suit in which the second decree had been made, should be at liberty to attend the proceedings under the first decree; but, on the ground that he was a stranger to that suit, refused to give him the conduct of it.

THESE were two creditors' suits attached to different branches of the court for the administration of the estate of the same testator. The bill in *Smith v. Guy* was the first filed, but a decree was first obtained in the other, and the decree afterwards made in *Smith v. Guy* directed that the master should be at liberty, if he should think fit, to adopt in that suit any of the accounts taken under the decree in *Brunwin v. Guy*.

Mr. *Rolt* now moved, on behalf of the plaintiff in *Smith v. Guy*, that all further proceedings under the decree in the other suit might be stayed, or that the proceedings in *Smith v. Guy* might be stayed, and that the plaintiff in that suit might have the conduct of the proceedings in *Brunwin v. Guy*, the master, in either case, being at liberty to adopt any of the accounts or inquiries already taken or prosecuted, as he should think fit.

The motion was founded on alleged collusion between *Brunwin* and the defendant *Guy*, who was the personal representative of the testator, and alleged irregularity in the decree in that suit.

Before Mr. *Rolt* had proceeded far in opening the merits,—

THE LORD CHANCELLOR said—I never heard of a
 [*160] party, who is a stranger to a cause, asking the court *to interfere with the prosecution of a decree in that suit on

1846.—*Smith v. Guy*.

the ground of some irregularity in the decree. The party who moves is a stranger to the cause of *Brunwin v. Guy*, except so far as the decree in his own suit gives the master liberty to adopt any accounts, taken in the other suit, which he may think fit. But he is no party to the other suit, or to the pleadings in the cause. It strikes me, however, that he ought to be present at the proceedings under the decree in that suit. His decree gives the master leave to adopt in his suit the accounts taken in the other: and the master will, of course adopt them, unless Smith shows some reason to the contrary; but it is much better that Smith should be there in the first instance than that he should make his objections after the proceedings in *Brunwin v. Guy* are concluded. I do not see how I can go further than that.

Mr. *J. Parker* who, with Mr. *Craig*, appeared for Guy, stated that Smith had, in fact, been served with all the warrants taken out under the other decree.

[THE LORD CHANCELLOR.—Yes; but what I shall now do, will give him the right to it.]

Mr. *Parker* then suggested, that the order should contain some reservation as to costs, as the interference of Smith in the proceedings in the other suit might, perhaps, lead to increased litigation and expense.

THE LORD CHANCELLOR.—The order should be, that Smith be served with all warrants in the proceedings in *Brunwin v. Guy*, and be at liberty to attend those proceedings; and, he not being *a party to that suit, reserve the consideration of the costs which may be occasioned by his attending those proceedings. [*161]

1846.—*Christian v. Foster.*

CHRISTIAN v. FOSTER.**BUNNETT v. FOSTER.**

1846: Dec. 7.

The trusts of a mixed residuary gift of real and personal estate having failed, the costs of a suit by the next of kin, claiming the whole on the ground that the real estate was converted out and out, were apportioned between the real and personal estates, although the title of the heir to the land was held to be so clear, that the court adjudged it to him in the absence of some of the next of kin.

THIS was an appeal from part of an order of the Master of the Rolls, directing payment of the costs of these suits rateably out of the real and personal estates of the testator.

The testator devised his real estate to trustees upon trust to pay the income to his niece Anne Worship and her daughter Anne Lefevre successively for life, and then to sell the estate. He then gave some pecuniary legacies, and bequeathed all his personal estate to the same trustees upon trust, to convert it into money, and to invest what should remain after payment of his funeral and testamentary expenses and debts, and the legacies before given, and to pay the income to the same tenants for life in succession; and, after the death of the survivor, to hold the monies so invested, and the monies produced by the sale of the real estate, upon trust to pay £100 to each of the children of Anne Lefevre who should survive her, and to pay the residue, or the whole, if there should be no such child, unto and among his brothers' and sisters' children who should be alive at the death of Anne Lefevre, or their respective executors or administrators.

[*162] *Anne Lefevre having survived her mother, and died without leaving any child, and there being no child of any of the testator's brothers and sisters then living, the question arose, in what way the fund in the hands of the trustees, consisting partly of the residuary personal estate and partly of the proceeds of the real estate (which had been sold with the consent of the tenants for life during their lifetime,) was to be dealt with.

1846.—*Christian v. Foster.*

Certain persons, calling themselves next of kin of a child of one of the testator's sisters, claimed the whole under the words "or to their executors or administrators." The next of kin of the testator claimed the whole as under an intestacy, insisting that the real estate was absolutely and for all purposes converted into personalty. On the other hand, two persons, each calling himself the testator's heir-at-law, claimed, as under an intestacy, the part of the fund which had arisen from real estates.

The first of the above mentioned suits was instituted by parties belonging both to the first and second classes of claimants: the second, by parties belonging to the second class only. And the inquiries directed in both were, first, whether there was any child of Anne Lefevre living at her death; secondly, whether there were any children of any of the testator's brothers and sisters living at her death; thirdly, who were the next of kin, at her death, of the testator's brothers' and sisters' children, and, if any of such next of kin were dead, who were their personal representatives; fourthly, who were the next of kin of the testator at her death, and if any of them were dead, who were their personal representatives; fifthly, who was the testator's heir-at-law.

By the result of the third and fourth of these inquiries, it was ascertained that both the classes to which *they [*163] referred were very numerous, and that some individuals belonging to each were parties to both the suits. The two persons who both claimed to be the heir-at-law, and who were also parties to the suits, agreed to settle the question of heirship between them.

The causes were heard together for further directions before the Master of the Rolls without any other parties being brought before the court.^(a) At the hearing, the claim of the next of kin of brothers' and sisters' children was given up, and the Master of the Rolls decided against the claim of the next of kin of the testator on the question of conversion, considering the point so clear as to justify the court in so disposing of it in the absence of many of that class who were not parties to the suits. And

(a) 7 Beav. 540.

1846.—*Christian v. Foster.*

his Lordship directed the costs of both suits to be paid rateably out of the portions of the fund which had arisen from real and personal estate.

From that decision as to costs, the heir-at-law appealed : and the appeal now coming on to be heard.

Mr. *Rolt* and Mr. *Borrett*, for the appellant, said, that there was no precedent for throwing upon the heir of a testator the costs occasioned by the unsuccessful claims of other parties upon the lands descended ; and that the effect of doing so, here, would be, to take away from the heir the very estate which the court, by the same decree, adjudication as, beyond all doubt, belonging to him ; though the greater part, by far, of the costs of the suit had been occasioned by the inquiries directed for the purpose of ascertaining parties, who turned out to have no title to any thing but the personal estate. That the primary fund for payment of funeral and testamentary expenses, debts, [*164] and legacies, was also the primary fund *for the payment of the costs of administering the estate ; *Ripley v. Moysey* ;(a) and, in this case, that fund was the personal estate. That *Attorney-General v. Southgate*, as altered by Lord Lyndhurst on appeal, was no exception to that rule ; for, there, the court held that the debts and legacies were payable rateably out of the real and personal estates as a mixed fund.(b) That in *Leacroft v. Maynard*,(c) the costs were apportioned, as a punishment to the heir for having instituted an unnecessary suit. And in *Walter v. Maunde*,(d) there was a mixed fund, and, moreover, the contest was not between the heir of the testator and parties claiming under his will, but between two parties, both of whom claimed under the will ; for, as the court construed the will, there was a trust of the proceeds of real and personal estate for the testator's next of kin ; and, some of them having died, the question was whether their shares went wholly to their personal representatives, or, so far as they consisted of the proceeds of real estate, to their heirs-at-law. That case, therefore, had no application to the present ; and in *Eyre v.*

(a) 1 Keen, 578.

(b) 12 Sim. 77.

(c) 1 Ves. 279.

(d) 19 Ves. 424.

1846.—*Christian v. Foster.*

Marsden, (a) the only point decided was, that property which turned out to be undisposed of by the will was to contribute its share of the costs of suit with the property which was well disposed of. On the whole, therefore, they submitted that the real estate ought at the most to be charged only with so much of the suit as exclusively related to it.

Mr. *J. Parker* and Mr. *Bird*, for the respondents, relied on the circumstance, that all the inquiries directed by the decrees were necessary, to enable the trustees safely to dispose of the fund in their hands; and that "on that principle the [*165] costs ought to be borne rateably between the two elements of which that fund consisted.

THE LORD CHANCELLOR, after stating the substance of the will, and the conflicting claims upon the fund, proceeded as follows:—

The Master of the Rolls held the next of kin of the testator to be entitled to so much of the fund as had arisen from the personal estate, and the heir-at-law to so much of it as had arisen from the real estate, and directed the costs to be paid rateably out of the realty and personalty, according to their value.

It appears from the report, (b) that the Master of the Rolls was asked to direct that all the costs should be paid out of the personal estate, which he refused; and it does not appear that any objection was raised as to the apportionment as directed. Upon the appeal, however, it was contended that the whole of the costs ought to be paid out of the personal estate; but, upon looking at the petition of appeal, I find that this question is not raised, but that the only complaint is, that the costs were ordered to be paid out of the realty and personalty according to their value, instead of a direction to separate the costs, and to pay so much as had arisen on account of the real estate out of the realty, and so much as had arisen on account of the personal estate out of the personalty. This, therefore, I consider as the only question for my consideration, and I think the appel-

(a) 4 Myl. & Cr. 231.

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(b) 7 Beav. 540.

 1846.—Christian v. Foster.

lant was well advised in not raising the other question by the petition of appeal, for it would have been most hopeless to contend that the appellant was not to bear any part of the costs of a litigation by means of which the title to the fund has been adjudged.

[*166] *It must be observed that, although during the lives of the tenants for life the funds were kept separate, they were united and blended upon the death of the survivor; and, had not the dispositions of the will failed for want of objects to take, the proceeds of the realty and personalty would from thenceforth have formed but one fund: but, owing to the failure of such objects, the separate character of each survives for the benefit of the next of kin, and the heir-at-law. The testator directed their union: events which he did not contemplate have prevented it. What in such cases is the rule as to costs?

There is no question here as to residue, for both part of the fund were intended to be given, and in both the gifts have failed for want of objects. Why, in such a case, is one part of the fund only to bear the costs of litigation common to both?

Many cases have occurred in which costs have been directed to be borne *pro rata* by different funds, part of which were undisposed of, but as to other parts of which the testator's intention prevailed: such was *Hovse v. Chapman*,^(a) *Ackroyd v. Smithson*.^(b) So, where legacies fail under the Mortmain Act, the costs are paid *pro rata* out of the part undisposed of, and the part well bequeathed; *Attorney-General v. Lord Winchelsea*,^(c) *Attorney-General v. Hurst*.^(d) In *Eyre v. Marsden* there was a mixed fund, part of which was decreed to the next of kin, and part to the heir-at-law; and costs had been incurred by inquiries and proceedings for the purpose of separating the different parts of the fund; and I directed that such costs should be appor-

[*167] tioned *pro rata* *between the funds of the heir and the next of kin. The case which comes nearest to the present is *Walter v. Maunde*; that was the case of a mixed fund of realty and personalty, which, under a gift to relations, the Master of the Rolls adjudicated to the next of kin, and directed all

(a) 4 Ves. 642. (b) 1 Bro. C. C. 503. (c) 3 Bro. C. C. 373. (d) 2 Cox, 364.

1846.—Christian v. Foster.

the costs to be paid out of the personal estate; but that Lord Eldon, upon appeal, altered, and directed that the costs should be apportioned according to the value of the real and personal estates.

It appears, therefore, that the direction of the Master of the Rolls in the present case is not only not contrary to the practice of the court, but that it is in strict conformity with the great majority of precedents; and in matters so much of discretion as questions of costs, I should have been most unwilling in a doubtful case to disturb a direction which, being within the principle of the court, was fairly open to the exercise of its discretion, particularly where substantial justice has been done. But the present is not, I think, doubtful; the inquiry asked—how much of the costs had been incurred in respect of the real and how much in respect of the personal estate—would be attended with great difficulty, nearly all the proceedings being common to both.

Appeal dismissed with costs.

*COOMBE v. RAMSAY.

[*168]

1846: Dec. 15.

All applications for leave to amend under the Orders of May, 1845, are to be made in the first instance to the Master.

AFTER the expiration of more than ten weeks from the filing of the answer, the plaintiff had applied to the master for leave to amend the bill. The application having been refused by the master, had been renewed before the Vice-Chancellor of England, who had also refused it.

It was now renewed, by way of appeal, before the Lord Chancellor, by Mr. *Cooper* and Mr. *Miller*, for the plaintiff, who insisted on the authority of *Lloyd v. Wait*,^(a) that it was a

(a) 4 My. & Cr. 257.

 1846.—Coombe v. Ramsay.

case in which the master had no jurisdiction, and, consequently, that an appeal lay from the Vice-Chancellor's decision.

Mr. *Spence* and Mr. *Stinton*, *contra*, contended on the authority of *Christ's Hospital v. Grainger*,^(a) that all applications to amend under the new Orders of May, 1845, were to be made in the first instance to the master, and, therefore, that the decision of the Vice-Chancellor in this case was conclusive: 3 & 4 W. c. 94, s. 13.

THE LORD CHANCELLOR.—The case of *Lloyd v. Wait* has no application: the decision being founded expressly upon the negative words in the 13th order of November 1831, which for some reason were omitted in the corresponding order of May 1845; and *Christ's Hospital v. Grainger* proceeded upon that distinction.

Motion refused with costs.

[*169] *In the Matter of THOMAS, a Lunatic.

1846: Dec. 5.

Application for a reference as to the propriety of advancing a large sum of money out of the capital of a lunatic's estate, to enable his eldest son to purchase an estate, refused.

THIS was the petition of the wife of the lunatic, as the committee of his estate, praying a reference to the master to inquire whether it would be fit and proper that any and what sum should be allowed out of the lunatic's estate to enable his eldest son, who was resident in the island of Barbadoes, to purchase an estate there, upon which the lunatic had a mortgage for £3000, and the equity of redemption of which had been offered to the son for the sum of £2000.

It appeared that the income of the lunatic's property was about

(a) 1 Phill. 634.

1846.—In re Thomas.

£1600 a year, of which £600 per annum had been allowed for the maintenance of him and his wife, and £300 for the maintenance of four of his younger children. That he had seven children in all, and that a reference similar to that now asked had, a short time ago, been made by Lord Lyndhurst, with a view to the allowance of a sum of £2000 out of the corpus of the estate for the purpose of setting up another of the younger children in business.^(a)

The petition stated that the son, on whose behalf the application was made, had no resources of his own except a precarious salary of £100, of which he was in the receipt as agent of another estate in the island.

Mr. *C. M. Roupell* appeared for the petitioner.

"THE LORD CHANCELLOR.—The court will advance [*170] small sums to put relations of a lunatic out as apprentices: but as to advancing large sums of £2000 to enable one of his family to buy an estate, I never heard of such a thing. In that way you might dispose of the whole of the lunatic's property, and leave him, if he recovers, to find all his property gone. If you can find any precedent for such an application, you may mention it again: but if there is none I shall certainly not make one.

JORDAN v. JONES.

1846: Dec. 11, 21.

The court will not make a peremptory order upon a married woman, to execute a conveyance of an estate not settled to her separate use.

THIS was a motion to discharge so much of an order^(b) of

(a) The Reporter has been informed, that the Lord Chancellor made this order with some hesitation, at the same time intimating to the petitioner, that he must not be very sanguine as to the result of the reference.

(b) See XII. Gen. Ord. 26th Aug. 1841.

 1846.—*Jordan v. Jones.*

the Vice-Chancellor Wigram, as ordered that the defendant Mrs. Jones, who was a married woman, should, within four days after service of the order, execute a conveyance pursuant to the decree and acknowledge it before the master or commissioner.

The plaintiff was equitable mortgagee of an estate by virtue of a deposit of title-deeds made by Mrs. Jones, before her marriage, she being at the time mortgagee in fee of the estate. The suit was for a foreclosure of the mortgage, or a sale. By the decree, it was ordered that the estates should be sold, and that all proper parties should join in the conveyance as the master should direct. The estate was accordingly sold, and the purchaser having paid his purchase-money into court was let into possession : but Mrs. Jones and her husband having refused to execute the deed of conveyance, the "above-mentioned order
[*171] was obtained for the purpose of enforcing the decree against them by process of contempt.

Mr. *Cooper* and Mr. *Saunders* for the motion, said that the only way in which a married woman could convey an estate not settled to her separate use was, before the passing of the 3 & 4 W. 4, c. 74, by fine ; and since that act, by the form thereby substituted.(a) And that in both cases it was of the essence of the act, that it should be voluntary ; that accordingly there was no case either before the statute, or since, in which a married woman had been committed for refusing to execute a deed. That on the contrary, the court was so jealous of any attempt to control her will, that it often refused to enforce against a husband an express covenant that his wife should join in a conveyance.(b)

Mr. *Giffard*, *contra*, observed that all the authorities referred to, were cases in which the husband had contracted to sell his wife's estate ; and that the rule which, in the case of a married woman, required a voluntary acknowledgement of a deed, as formerly of a fine, had reference only to her subjection to mari-

(a) *Sa.* 79, 80. (b) *Sugd. V. & P.* 10th Ed. c. 4, s. 3, pl. 19, and the cases there cited.

1846.—*Jordan v. Jones.*

tal control, and was not intended to paralyse the arm of the court in the execution of its decrees, whenever a married woman happened to be concerned.

He also referred to the stat. 1 W. 4, c. 36, s. 15, r. 15, (the Contempt Act.)

Mr. *Cooper*, in reply, referred to the 1 W. 4, c. 60, (the Trustee Act.)

*THE LORD CHANCELLOR.—When once you make a [*172] married woman a trustee, of course there is no difficulty, but that is not the question here.(a) It is, however, quite new to me that the court has no jurisdiction to compel a conveyance by a married woman pursuant to its decree. The difficulty is, that the order goes to compel her to do what the statute says shall be voluntary. In a certain sense, however, she does it voluntarily when she does it in obedience to the order, for she does it to avoid the consequences of not doing it. There is no doubt that all the rules with respect to married women are to protect them against the husband. I am told, however, that the same question occurred, when I last held the Great Seal, and that I then decided it. I will, therefore, reserve my judgment until I have seen what was done in that case.

Dec. 21.—On a subsequent day, his lordship said, that he had been furnished with a note of the case of *Foxon v. Foxon*(b) (the case to which he had referred,) in which the same question occurred, and in which, concurring in opinion with the Master of the Rolls, he had come to the conclusion that the court had no authority to make such an order as this against a married

(a) In *King v. Leach*, 2 Hare, 57, where in a foreclosure suit by an equitable mortgagee, the estates had been sold under the decree, but the mortgagor was abroad, the court treating him as a trustee, for the plaintiff, made an order for the appointment of a person to convey in his place. 1 W. 4, c. 60, m. 8, 18.

(b) The Reporter has been unable to procure the papers in this case, but he has been informed by the solicitor engaged in it, that it arose in 1836, upon a petition praying that a female ward of court, who, having attained twenty-one, had married without the sanction of the court, might be ordered to execute the settlement subsequently made of her property under the direction of the court.

1846.—Jordan v. Jones.

woman ; and that he should adhere to that decision in the present case.

Order discharged.

[*173]

*BROWN v. ROBERTSON.

1846: Dec. 16.

An order discharged for irregularity with costs, though the notice of motion was general. An order may be impeached for irregularity, although the notice of motion do not specify that as the ground of it, the omission being material only as to costs, and not always even as to them.

THIS was a motion on the part of the defendant, to discharge an order of the Vice-Chancellor of England, dated the 4th June 1846, for the appointment of a receiver, and another order of the 27th November, refusing with costs a motion to discharge that order.

The notice of the appeal motion was general : but Mr. *Teed*, in support of it, relied solely upon the ground of irregularity, inasmuch as the order of the 4th June purported to be made on an affidavit of service, whereas it appeared that the notice of motion on which it was made, was served after eight o'clock on Monday evening, for the following Thursday, when the order was pronounced.

Mr. *Js. Parker*, and Mr. *Bazalgette*, *contra*, stated that the defendant appeared personally in opposition to the motion, on the 4th of June when it was made, and they insisted that appearance was a waiver of the irregularity of service.

[THE LORD CHANCELLOR.—Not, if he only appeared to protest.]

They further contended, that a party who complained of an order on the ground of irregularity, was bound to state it expressly in the notice of motion.

1846.—*Brown v. Robertson.*

"THE LORD CHANCELLOR.—That is only material as [*174] to the costs in any case, and in the view I take of this case, it is not material even in that respect.

On the conclusion of the argument, his lordship said.—The order was obtained on an affidavit of service, which was not in fact a regular service, and which the party was bound to know was not a regular service. I cannot but consider that an attempt to impose upon the court : and it has, in fact, imposed upon the court. I am told, indeed, that the defendant was personally present when the order was made : but if he came merely to inform the court that he had not been regularly served, and the court overruled that objection, and proceeded on the merits, the court was in error. However, whether that was so or not, I cannot take notice of what took place before the Vice-Chancellor, for his order itself informs me that it was made on an affidavit of service, and it is now established before me that that service was an improper service, and if a party obtains an order on an improper service, he cannot be allowed to take any benefit from it. I shall therefore discharge both the orders with costs, without prejudice to any other motion on merits.

Mr. *Parker* submitted, whether the circumstance of the notice of motion before the Vice-Chancellor not having specified irregularity as the ground of it, did not disentitle the defendant to the costs of that motion.

"THE LORD CHANCELLOR.—You brought the party [*175] into litigation by an order irregularly obtained. He had two objections to it, one of form, and the other of merits. He was not bound to elect between them, and form his own opinion as to the validity of his objection on the point of regularity.

1846.—*Rigby v. Strangways*.

RIGBY v. STRANGWAYS.

1846: Dec. 17.

Where two suits are instituted for the administration of the same estate, and on a decree being obtained in one of them, an application is made to stay proceedings in the other; the question always is, whether the latter suit asks any thing more than can be obtained in the former.

A question between the heir at law and next of kin as to conversion of real estate, cannot be disposed of in a suit in which neither of those parties is plaintiff.

THIS was the renewal of a motion, which had been refused by the Vice-Chancellor of England, on the part of a defendant who had been served with a copy of the bill, for leave to enter a common appearance, and to defend the suit in the ordinary way, notwithstanding the time limited for making the application by the 16th General Order of May, 1845, Rule 5, had expired.

The bill was filed in November, 1845, by one of several residuary legatees under a bill, for an administration of the testator's estate. The defendant who now moved, and who was another of the residuary legatees, was not served with a copy of the bill until the 5th of August, 1846, previously to which he had himself, in the month of July of that year, filed another bill for the administration of the same estate. Replication was filed in the first suit on the 11th of November, and the motion above-mentioned before the Vice-Chancellor, was made on the 25th of that month.

[*176] *Both the bills alleged, that part of the real and personal estate comprised in the residuary gift, was undisposed of by reason of the death of some of the residuary legatees in the testator's lifetime; but the second bill, in which the defendant who now moved, sued in the character of one of the next of kin in as well as of residuary legatee, insisted that the real estate was by will converted out and out into personalty, and accordingly prayed that the realty undisposed of as well as the personalty might be adjudged to the next of kin.

Mr. Stuart and *Mr. Elderton* for the motion, said, that there

1846.—*Rigby v. Strangways*.

were questions as to the legitimacy of some of the next of kin, and that their client apprehended that his title as one of such next of kin might be prejudicated unless he had an opportunity of obtaining inspection, in the master's office, of certain documents which were in the custody of some of the parties to the suit, and of examining them on interrogatories, which he could not do unless he were an active party in the cause.

Mr. *Rolt* appeared for the plaintiff, but

THE LORD CHANCELLOR (without hearing him) said, that the application being to the discretion of the court, he should certainly exercise that discretion, as the Vice-Chancellor had done, in such a manner as, if possible, to prevent two suits being prosecuted for the administration of the same estate. If the defendant chose to dismiss his own bill, it was quite right that he should be an active party to this suit; but he must make his election between them, and if he preferred going on with his own suit, this motion must be refused.

*The defendant declining to abandon his own suit, the [*177] motion was

Refused with costs.

The plaintiff having a few days afterwards obtained a decree in this suit, gave notice of a motion before the Lord Chancellor, that all further proceedings in the defendant's suit, which was in a different branch of the court, might be stayed.

Mr. *Rolt* and Mr. *Bailey* for the motion, stated the minutes of the decree, which directed, amongst other things, the usual inquiries as to the testator's heir-at-law and next of kin, which they submitted would enable the court on further directions to dispose of all the questions that could arise in reference to the estate.

THE LORD CHANCELLOR.—The second suit raises a question of conversion as between the next of kin and the heir, in which the plaintiff in the first suit, not being one of the next of kin,

 1846.—*Rigby v. Strangways*.

has no interest; and a question of conversion cannot be decided between co-defendants on petition. The question on applications of this kind is, whether the suit which is sought to be stayed, asks something more than could be obtained under the existing decree; and that being the case here, the motion must be refused with costs. It will be proper, however, that the decree in this suit should be referred to the same Master to whom the former decree was referred, in order to avoid the expense of taking the accounts twice over.

[*178]

**COOPER v. LEWIS*.

1847: Jan. 11.

If a petition for an *ex parte* order suppresses any fact which, whether really material or not, would, if communicated to the officer, whose duty it is to draw up the order, prevent him from doing so without mentioning the matter to the court, the order will be discharged for irregularity.

Semble. After a general demurrer to a bill has been overruled on argument, the plaintiff is not entitled as of course to an order dismissing his bill with costs.

A general demurrer filed by one of the defendants in this cause, having, on argument, been overruled on the 10th of November, 1846, the defendant presented a petition of appeal. After that petition had been answered, but before it had been served, or any deposit made under it, the plaintiff, on the 1st of December, obtained the usual *ex parte* order, at the rolls to dismiss his bill, upon a petition not noticing the demurrer, but merely stating, in the usual form, that no answer had been put in to the bill. That order having, on the motion of the defendant, been discharged for irregularity, the plaintiff appealed.

Mr. *Parker*, for the appeal motion, having stated these facts,

THE LORD CHANCELLOR inquired whether there was any

1847.—Cooper v. Lewis.

case in which a bill had been dismissed by an order of course, after a decree or any thing in the nature of an adjudication.

Mr. Parker referred to *Carrington v. Holley*,^(a) in which it had been done after the cause had been heard and an issue directed. He also mentioned *Curtis v. Lloyd*.^(b)

THE LORD CHANCELLOR.—In the case in *Dickens*, Lord Hardwicke proceeded expressly on the ground, that there had been no determination; *the order directing [*179] the issue being treated as merely prefatory. Here there has been an adjudication, from which the defendant might appeal, and has appealed. Now, the adjudication of the court of appeal, is, in effect, an adjudication of the date of the hearing below; and such an adjudication, if it should be in the defendant's favor, would be a very different thing to him from your dismissing your bill; it might be pleaded to another bill.

Mr. Parker.—If the mere existence of an order, from which the defendant has a right to appeal, is to interfere with the right of a plaintiff to dismiss his bill, it will reduce that right almost to a shadow; for there are few causes in which some interlocutory order is not made in an early stage of the suit.

Mr. Rolt and *Mr. Terrell*, *contra*, in addition to the point adverted to by the Lord Chancellor, observed, that by the dismissal of the bill, the defendant not only lost the chance of obtaining a decision in his favor on the merits, but also of recovering back the costs of the demurrer which he had been ordered to pay. And they further contended, that the petition on which the order was obtained, ought to have noticed the demurrer and the proceedings which had been had upon it; adding, that that was the ground on which the Master of the Rolls had discharged the order.

THE LORD CHANCELLOR.—Is not that ground included in

(a) 1 Dick. 280.

(b) 4 Myl. & Cr. 194.

1847.—Cooper v. Lewis.

the other? For, if the facts are not material, they need not be stated in the petition.

Mr. *Rolt*.—The principle on which the Master of the [*180] Rolls acts in all *ex parte* applications is that the *petitioner is not to be the judge of the materiality of facts, but ought to state them in the petition, in order that the court or its officers may have an opportunity of considering their effect before the order is drawn up, *Cartwright v. Smith*.(a) And, in this case, the officer at the rolls, to whose department these petitions belong, has stated that if the circumstances relating to the demurrer had appeared upon the petition, he should not have drawn up the order without mentioning them to the Master of the Rolls.

Mr. *Parker* in reply, observed that, in *Cartwright v. Smith*, the fact suppressed was clearly a material fact. That as to the other point, the defendant's right to appeal for the sake of costs could not help him; for the practice of the court recognized no such right: and that, in any other respect, it was difficult to see how the existence of an order overruling a demurrer could interfere with the plaintiff's right to dismiss the bill, any more than the mere filing of a demurrer would.

THE LORD CHANCELLOR.—It is very convenient that the court should have the power of making these orders *ex parte*; but still they are orders, which if not made with caution may be productive of great injustice. I have it from the officer of the court whose duty it is to draw up such orders, that, where any proceeding of this kind has taken place, he would not issue the order without reference to it. The petition, it is true, does not state any thing false; but it does so suppress what was true, as to leave it to be inferred that nothing had taken place [*181] in the cause *beyond the mere filing of the bill, and the defendant's appearance. That is the ground on which the Master of the Rolls proceeded in discharging the order, and

 1847.—Cooper v. Lewis.

perhaps it is the safer one to rest the decision upon. But I think upon the more general ground which has now been argued, the order was wrong in substance.

The plaintiff is allowed to dismiss his bill on the assumption that it leaves the defendant in the same position in which he would have stood if the suit had not been instituted; but that is not so where there has been a proceeding in the cause which has given the defendant a right against the plaintiff. The defendant here had a right to appeal from the order on the demurrer: and if he succeeded he would have his costs back and an adjudication of the court upon the merits. That right he loses, if the plaintiff is entitled to dismiss his bill as of course. If the plaintiff is at liberty to do that now, he would be so even after the appeal had been heard, and at any time before the decision should be pronounced. It is difficult to say, that the court should under such circumstances allow the plaintiff to dismiss his bill without imposing some conditions. I think, therefore, on the merits of this motion, if I had to decide the point, that the *ex parte* order was wrong, because the effect would be to enable the plaintiff, by paying a very small amount of costs, to deprive the defendant of a right to recover a much larger amount; but it is sufficient for my present purpose, that according to the practice of the branch of the court in which this order was obtained, the order would not have been made without reference to the particular facts of the case, if they had been stated in the petition.^(a)

Motion refused with costs.

 *MASTERMAN v. LEWIN.

[*182]

1847: Jan. 11.

It is irregular in an interpleading suit to direct any inquiries as to the conflicting claims of the defendants until the answers of all of them have been put in.

(a) There seems to be an exception to the strictness of this rule in the case of an application for leave to sue *in forma pauperis*. See *Dresser v. Morton*, *post*.

 1847.—*Masterman v. Lewin*.

Where an injunction has been granted in an interpleading suit, all the defendants are interested in it, and all ought therefore to be served with notice of a motion to dissolve it.

On a motion to dissolve an injunction in an interpleading suit, an order was made directing an inquiry as to the title of the defendant, who moved; but with respect to the co-defendant, who had not answered, and did not appear upon the motion, only directing an inquiry whether he had made a claim. After the Master had made his report, and the court had pronounced its final order, the order of reference was discharged, and the consequential proceedings set aside at the instance of the plaintiff, on the ground—1st. That the order was irregular in not reciting an affidavit of service on the absent defendant; 2dly. That it was contrary to the practice to direct any inquiry as to the title of the defendants until the answers of all of them had come in; and 3dly. That the inquiry actually directed was defective, in not extending to the title of the absent defendant as well as to that of the other.

THE defendant Lewin, having brought an action of trover against the plaintiff for certain title deeds, this bill was filed for an injunction, and to compel Lewin to interplead for them with the other two defendants, John Wild Price and Joseph Price.

The bill stated that the plaintiff, who was a solicitor, had become possessed of the deeds as successor in business to one Harman deceased, who had been one of the trustees under indentures of settlement, dated in the year 1799, (the last of the deeds in question in point of date,) by which the estate to which the deeds related, and which then belonged to Anna Maria Price, the mother of the defendant, Joseph Price, had been settled previously to her marriage, to the use of herself and her then intended husband for their successive lives, with remainder to the children of the marriage as tenants in common in fee. That Anna Maria Price had died in 1819, and her husband in 1833, and that they had nine children all of whom survived them. The bill then stated the claims that had been made to the deeds

by the three defendants; Lewin claiming them as purchaser of the estate from the nine children, John *Wild Price, as surviving trustee of the settlement, and Joseph Price, on a suggestion that his mother was under age at the date of the settlement, claiming them as her eldest son and heir at law. And the bill charged that, the plaintiff had offered to deliver the deeds to Lewin, upon having an indemnity against the other claims, but that the offer had been refused.

An injunction was obtained *ex parte* on the filing of the bill.

1847.—*Masterman v. Lewin*.

The defendants, John Wild Price and Lewin, both duly put in their answers insisting on their respective claims as suggested by the bill. The answer of Lewin, which was filed in February 1845, set forth the several indentures by which the shares of the nine children, including Joseph, had been conveyed to him upon their successively attaining twenty-one; the last of such indentures being dated in 1841. He further stated that, he had been in the receipt of the rents and profits of the several shares from the dates of the conveyances respectively, and he insisted on the conveyance of his share by Joseph, on the statute of limitations, and on lapse of time, as a bar to the right of the latter as heir-at-law, if any such existed. He also alleged collusion between the plaintiff and Joseph Price.

At the beginning of July 1845, Lewin gave notice of a motion to dismiss the bill for want of prosecution, and, a few days afterwards, notice of another motion to dissolve the injunction. Both the motions came on to be heard before the Vice-Chancellor Knight Bruce, on the 13th of July; when, notwithstanding Joseph Price had not answered, and did not appear upon the motion, his Honor made an order by which, after reciting that J. W. Price, by his counsel, disclaimed, and that the plaintiff *undertook to deposit the deeds with the clerk of records and writs, it was referred to the Master to inquire whether Lewin was entitled to the deeds; whether Joseph Price had ever made any and what claim to them; and when and under what circumstances the deeds came into the possession of the plaintiff, with liberty to state special circumstances, and liberty to Joseph Price to attend the inquiries; and it was further ordered, that both the motions of Lewin should stand over till after the Master should have made his report.

In October 1845, Joseph Price put in his answer insisting on his claim to the deeds on the ground stated in the bill.

On the 30th of June 1846, the Master made his report by which, after reciting that he had been attended by Joseph Price as well as by the other parties, he found that Lewin was entitled to the deeds: and that Joseph Price had claimed them before the bill was filed, and had also carried in a state of facts

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and claim before him, but had not adduced any evidence in support of it.

The report having been confirmed,

The two motions came on again before the Vice-Chancellor, on the 25th of November 1846, when it was ordered that the plaintiff should pay to the defendant, J. W. Price, 40*s.* costs, in respect of his costs of the suit; and to the defendant Lewin his taxed costs of the two motions, and of the proceedings in the Master's office under the order of the 13th of July 1845, and of that application, and consequent thereon; and that the injunction should be continued, and the documents delivered by the plaintiff to Lewin.

[*185] *This was an appeal motion on behalf of the plaintiff to discharge both the order of the 13th of July 1845, and the order of the 25th of November 1846.

Mr. *Cooper*, for the appeal motion, contended, that the first order was irregular, it being contrary to the practice of the court in suits of this kind to put the parties to interplead, or to direct any inquiry into their respective claims, until all the answers had come in. If, upon a motion to dismiss the bill, or to dissolve the injunction, it appeared that the plaintiff had been remiss in getting in the answers, the court might either grant the motion, or give the plaintiff further time either to compel an answer or to take the bill *pro confesso* against the party in default; but to direct inquiries as to the titles of the several claimants before they had respectively informed the court what their claims were, was contrary to all principle as well as to established practice; *Hyde v. Warren*,^(a) *Townley v. Deare*,^(b) *Farebrother v. Prattent*,^(c) *Statham v. Hall*.^(d) Had the court in this case deferred the inquiries until Joseph Price had answered, the expense which had been occasioned might have been spared, for it would have appeared that the only issue to be tried between the parties was, whether Anna Maria Price was of age at the date of the settlement. Independently of this objection, it was insisted that the inquiries themselves were un-

(a) 19 Ves. 322. (b) 3 Beav. 213. (c) 5 Price, 303. (d) Turn. & Russ. 30.

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usual in form and imperfect, for while the inquiry as to Lewin was, whether he was entitled to the deeds; as to Joseph Price, it was only whether he had made a claim to them, not whether he was entitled.

*As to the second order, he contended, that it was in- [*186] consistent with itself, for if collusion had been proved, which it was not, the bill ought simply to have been dismissed; whereas the court in fact ordered the deeds to be delivered to one of the defendants: if, on the other hand, there was no evidence of collusion, where was the ground for making the plaintiff pay the costs? Lewin by insisting on the statute of limitations and other grounds of defence against Joseph Price's claim, showed that he did not consider it frivolous or without some foundation.

THE LORD CHANCELLOR, on looking at the first order, observed, that it did not recite an affidavit of service on Joseph Price, and that that omission made the order irregular without going any further, for it was the very essence of an interpleading suit, that the plaintiff was subject to adverse claims by several parties; when an injunction was granted in such a suit, all the defendants were interested in it, and on a motion to dissolve it the court could not proceed in the absence of any of the claimants.

Mr. *Russell* and Mr. *Montague*, for Lewin, said, that the first order was in fact an indulgence to the plaintiff, and having been accepted by him as such at the time, to avoid the dismissal of his bill, he ought not now to be heard to complain of it as informal.

[THE LORD CHANCELLOR.—If the defendant was entitled to have the bill dismissed, why did he not insist upon it? Instead of that, he chose to take the order now before me, and the only question now is, whether that order is consistent with the practice in interpleading suits.]

*If the plaintiff could be heard at all to complain of [*187] irregularity in the order, it could only be on the ground

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that Joseph Price would not be bound by it, or, consequently, by the subsequent proceedings; and, therefore, that the plaintiff would lose the indemnity which it was his object by this suit to obtain. But it was impossible to say that Joseph Price would not be bound by the proceedings, when he had attended the inquiries before the master, and been an actor in them. As to the substance of the inquiries, they were calculated to settle all matters which were really in dispute between the parties. John Wild Price being out of the way, the only contest was between the other two, and if Lewin was entitled to the deeds, it followed of course, that Joseph Price was not, and *vice versa*. Had the plaintiff for his own security or satisfaction desired an inquiry, whether, in the event of Lewin not being found to be entitled, Joseph Price was entitled, he might have had it: but from the nature of the case, such an inquiry would obviously have been superfluous. As to the second order, they contended, that that part of it which related to the costs was justified both by the circumstances before adverted to, under which the original order was made, and also by the frivolousness of the claim of Joseph Price, which, coupled with other circumstances stated in the master's report, warranted at least a strong suspicion that the plaintiff had throughout been colluding with him.

THE LORD CHANCELLOR observed during the argument, that if no authority could be produced for the course adopted in the first order, it was useless to go into the question on the second order as to the collusion, and that part of the case was accordingly but little discussed.

At the conclusion of the argument for the respondent,

[188] *THE LORD CHANCELLOR said :—This is a very unfortunate case, and only one of several instances that have lately come before me, of an attempt to do justice in the particular case by means of a departure from the regular course and practice of the court. If that course and practice had been followed in this case, the rights of the parties would now have been satisfactorily ascertained, and the contest would have been

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at an end. The great difficulty which I now feel is, being satisfied that the order of July, 1845, is irregular, how to deal with the litigation without involving the parties in further expense.

The bill states adverse claims of two parties, one claiming under a settlement, the other against it, on the ground that the property devolved upon him as heir-at-law. That is a case in which the plaintiff is entitled to the interference of the court, upon a bill of interpleader. A bill is accordingly filed. One party puts in an answer, the other does not. The first then moves to dismiss the bill, and then to dissolve the injunction. But the suit was not then in a state in which the court could dispose of the matter, because one of the defendants not having put in his answer, the court could not know what his case might be. The proper course in that state of things would have been, either to give the plaintiff further time to get in the answer or take the bill *pro confesso* against the defendant who had not answered, or, if the court should be of opinion that the plaintiff had not entitled himself to that indulgence, to dismiss the bill. Instead of which, however, without any notice to the defendant who had not answered, the court refers it to the master to inquire whether the party who has answered was entitled to the deeds; and as to the other, not whether he was entitled to the deeds, but whether he had made a claim or not. Now that is obviously not the proper form of inquiry in a suit of this nature; for, "suppose the master had found that the de- [*189] fendant Lewin was not entitled, he might perhaps have seen that the other defendant was entitled, but yet he would have no authority under such an order as this to say so.

In these cases, the court is bound not only to consider the interests of the parties in the suit, but as far as possible to keep the practice of the court intact. By neglecting to do so, it runs the risk of having all the subsequent proceedings set aside by reason of the irregularity of the order on which they are founded. When, by a single departure from the practice, a suit is once involved in a labyrinth of this kind, it is impossible to extricate the parties without great expense.

My object now is to effect that at as little cost as possible: I should say, upon the evidence, that the costs ought to be paid

 1847.—*Masterman v. Lewin*.

by Joseph Price, because there being an absence of all evidence of collusion, and positive evidence of a claim having been made by Joseph, if he cannot establish that claim, he, being the author of the expense which has been incurred, ought to pay it. But if I were to act upon information irregularly obtained, I should be falling into the same error which has been committed in the court below by the course which has already been taken. I can, therefore, only discharge these orders. It is extremely to be regretted, but I have no option. From what has been done, however, one can pretty well see that the only question will be between the plaintiff and Joseph Price as to the costs; for it is plain that Lewin's title to the deeds will not be contested, and as I cannot order the plaintiff to pay the costs without more evidence of collusion than I have now, I can only throw it out for the consideration of the parties, that if collusion be made out, the plaintiff will have to pay the costs: if not, Joseph will have to pay them: and as I believe he is unable to pay them, I should suggest [*190] whether the defendant *Lewin would not do well to abandon that part of the order which entitles him to costs as against the plaintiff, instead of forcing the plaintiff to go on with the suit merely for the sake of the costs. Let the order not be drawn up till the parties have considered what shall be done.

The case was not mentioned again.

BRISTOWE v. NEEDHAM.

1847: Jan. 12.

After a petition had stood over at the request of the respondent's counsel for his convenience, the petitioner incurred a contempt, which he had not cleared when the petition came on again. *Held*, that he was nevertheless entitled to be heard.

A receiver, who, without the sanction of the court, defends an action brought against him by a party to the cause, is not on that account dis-entitled to the assistance of the court, in recovering from such party the extra costs of the action, although, if his defence had failed, he would not, under such circumstances, have been entitled to reimbursement.

1847.—*Bristowe v. Needham*.

THIS was an appeal petition seeking to discharge an order of the Vice-Chancellor of England directing the plaintiff, Colonel Needham, to pay the extra costs incurred by the receiver in the cause in an action brought against him by the defendant, and which he had successfully defended, but without the sanction of the court.

The appeal petition came on for hearing in July, 1846, when it stood at the request of the respondent's counsel for his convenience.

On its now coming on again,

Mr. *Cooper*, for the respondent, took a preliminary objection, that the petitioner was in contempt for non payment of costs under another order made in November, 1846.

*Mr. *Rolt*, for the petitioner, admitting the general [*191] rule, that a party in contempt could not be heard, contended that, as the petition had stood over at the request of the respondent's counsel his original right to be heard was not taken away by a subsequent contempt.

THE LORD CHANCELLOR said, it was a pure question of practice whether such a case was an exception to the general rule, and asked whether there was any authority upon the point.

The case stood over for a day to search for authorities but none being found,

THE LORD CHANCELLOR, on the following day, said, that as the petition had stood over on the application of the party who now made the objection, he thought the objection ought not to prevail.

On the merits, it was contended, that the receiver was not entitled to be reimbursed any expenses which he had incurred in making a defence without the sanction of the court.

THE LORD CHANCELLOR said, that, though that circumstance

1847—*Bristowe v. Needham.*

would have deprived the receiver of his claim to reimbursement if he had failed in his defence, yet, as he had succeeded without putting the estate to an expense of an application to the court, which he might have made for his own security, there was no reason why he should not stand in the same position as to indemnity, as if he had made that application.

Appeal dismissed.

[*192]

**KNOTT v. COTTEE.*

1847: Jan. 12.

Words of recommendation or desire in a will, will not raise a trust if such construction would conflict with other provisions of more definite and positive import in the same instrument; but the court will give such effect to them as may not be inconsistent with those provisions.

A father having by his will appointed a guardian to his children, with a recommendation that, in the event of their mother's death during their minorities, they should be placed under the care of two female relations. *Held*, on a contest between those ladies and the testamentary guardian, in reference to the management of the children after the mother's death, that the court was bound to give effect to the recommendation, but not further than might be consistent with preserving to the testamentary guardian the general superintendence and control over the children and their fortunes, which, by virtue of his office, it was his right and duty to exercise.

THIS was an appeal by the defendant, as the surviving testamentary guardian of three infants, against an order of the Vice-Chancellor of England, confirming a scheme which had been approved by the Master for their education and management.

The eldest of the infants was a boy of the age of eleven, the other two were girls, of the respective ages of nine and five years. Their fortunes, which were considerable, were derived partly under the will of their father, and partly under that of their mother; the fortune of the boy being about £2000 a year, and those of the girls about £8000 each. Their father died in January 1844, and their mother in the month of October of the same year. The father by his will, appointed his wife, the defendant Cottee (the present petitioner) and a Mr. Ibbetson, who

1847.—*Knott v. Cottee.*

was since dead, executors and trustees ; and after appointing the same persons guardians of his children, he "recommended" that if his wife should die before his son should attain twenty-one, or before his daughters should attain that age or marry, the surviving guardians or guardian should place his said children, or such of them as should then be minors, under the care of his cousin Mary Prior, to be assisted by their aunt Sophia Berry.

*After the death of the father, his widow and children, [*193] and, after the death of the widow, the children continued to live at a country residence near Barnet, where the family had resided for some years previously, and upon which their father had expended a considerable sum, an establishment being kept up for them by the defendant Cottee, as surviving trustee. About twelve months after the mother's death, this suit was instituted in the names of the two daughters by their maternal grandfather as their next friend, for the purpose of making them and their brother wards of court. And upon a petition presented by him, an order was made by the Vice-Chancellor of England, directing the usual inquiries respecting their fortunes, and referring it to the Master to settle a scheme for their education and management.

The scheme—which was suggested by the next friend, and ultimately approved by the Master upon the certificate of physicians, that the health of the children was delicate, and required careful and peculiar treatment,—provided, that they should forthwith be placed under the care, and be maintained and educated under the direction of Mary Prior, assisted by Sophia Berry; and that they should reside at Brighton during the latter part of the year, during the spring in the Isle of Wight, and for the rest of the year at some other place, to be settled at the time : that the daughters should be educated at home by the governess they then had, and who had been engaged by their parents, or by an equally competent person to be appointed by Mary Prior, and that the boy should be placed by her at a good day-school at Brighton. And the sum of £1624 a year was allowed for their maintenance, to be paid to Mary Prior.

*Mr. Cottee objected to the children being removed [*194] from Barnet, to a place more distant from his own place

1847.—*Knott v. Cottes.*

of residence, which was in London, and particularly to the frequent changes which were proposed in their place of abode, as likely to be detrimental to the boy's education. But his principal objection to the scheme was founded upon the religious opinions of the two ladies to whose care the children were to be committed, Miss Prior being a Quaker, and Miss Berry a dissenter from the Church of England. On the other hand, these ladies disclaimed all intention of bringing up the children otherwise than according to the doctrines of the church of England, and relied upon the recommendation contained in the father's will, as a conclusive answer to the objection made to them on the score of religion, and as entitling them to the full measure of discretion and control in the management of the children, which the Vice-Chancellor's order had awarded to them.

Mr. *Js. Parker* and Mr. *Bagshawe*, appeared for the appellant.

Mr. *Rolt*, Mr. *Bacon* and Mr. *Lloyd*, in support of the Vice-Chancellor's order.

THE LORD CHANCELLOR, after hearing the counsel for the respondents, said it would be convenient that he should state at once the view he had formed of the case, and that he would hear the reply afterwards if necessary. Accordingly, after observing that, as the physicians had recommended Brighton in preference to Barnet as the place of the children's residence, he should not be justified in interfering with that part of the order, his lordship continued as follows :—

[*195] *With respect to the objection founded on the supposed religious opinions of these two ladies, the testator must be supposed to have been cognizant of their opinions ; and if he was, whatever authority he has given to them, cannot be controlled by any opinion of the court as to the correctness of those opinions. When I first heard the objection, I thought there was an intention on the part of these ladies to bring up the children in their own belief ; but I find they do not contend for that : they have appointed a governess of the Church of England, and

 1847.—*Knott v. Cotte*.

all parties seem to concur in the opinion that the children ought to be educated in the doctrines of the Church of England. There is therefore, on the facts before me, no question whether they shall be brought up in one belief or the other: and the danger which has been suggested from their being under the care of these ladies, is only a possible danger which was known to the testator, and which he thought proper to disregard.

The only other question is, as to the extent of the authority and control over the children, which the order gives to these ladies.

Now, although I am clearly of opinion that they have no claim whatever to the character of testamentary guardians, yet it is certain, that the testator has expressed a wish with respect to them, which this court, no less than the testamentary guardian, is bound to attend to. He first appoints trustees: that is a distinct thing. Then he appoints certain persons, amongst them the petitioner, guardians of his children, and in the event of the wife dying before the son should attain twenty-one, or the daughters should attain that age or marry, then he recommends that the surviving "guardians or guardian [*196] should place the children, or such of them as should be minors at the death of his wife, under the care of his cousin Mary Prior, to be assisted by their aunt Sophia Berry.

I have had frequent opportunities of considering the effect of words of recommendation. One was in a recent case in this court, where the question was whether a recommendation by the testator, that a certain person should be employed as receiver and manager of his property, gave that person any legal interest.^(a) Another case was that of *Shaw v. Lawless*,^(b) where the House of Lords laid it down as a rule which I have since acted upon, that, though "recommendation"^(c) may in some cases amount to a direction and create a trust, yet that, being a flexible term, if such a construction of it be inconsistent with any positive provision in the will, it is to be considered as a recommendation, and nothing more. In that case, the interest

(a) *Finden v. Stephens*, ante, p. 142.

(b) 5 Cl. & Fin. 129.

(c) See a curious instance of the effect given to such a recommendation annexed to the appointment of a guardian, in *Duke of Beaufort v. Bertie*, 3 P. Wms. 702.

1847.—*Knott v. Cottes*.

supposed to be given to the party recommended was inconsistent with other powers which the trustees were to exercise; and those powers being given in unambiguous terms, it was held that, as the two provisions could not stand together, the flexible term was to give way to the inflexible term.[1] Applying that doctrine to the present case, I find, on the one hand, the petitioner invested by the will with the office of testamentary guardian, an office well known to the law, and the duties of which are perfectly well defined and understood: and, on the [*197] other hand, a recommendation, that in a certain event *the children shall during their minorities be placed under the personal care of two female relatives. And the question is, whether under those circumstances I am to exclude the testamentary guardian, and to conform an order which directs that the children and their education shall be under the direction (which of course excludes every other direction) of these ladies.

The order, adopting the Master's report founded on the opinion of two medical gentlemen, provides that the children shall reside at Brighton for a certain part of the year, and that in the spring they shall go to the Isle of Wight as more conducive to their health, and the Master seems to think that that or some other place should be settled at the time. Who is to settle that at the time? Miss Prior I suppose: because the order gives her the direction of their education. Then a governess has been appointed: that governess, for any thing that the order provides, may be removed the next day by Miss Prior. A large income, of £1600 or £1700 a year, is allowed to that lady for the maintenance and education of the children. Is that to be allowed to a person who is not a testamentary guardian? Is the testamentary guardian to have no supervision as to the mode in which the money is to be expended? I cannot think that that is consistent with the testator's intention.

What occurs to me, therefore, on that point is this. I see no objection to leaving the immediate custody of the children to Miss Prior, who being with the children may be better able to judge what they actually want; but that there should be no

[1] See *Finden v. Stephens*, ante, p. 142, and note, p. 148.

1847.—*Knott v. Cottes.*

change of residence, and no change of governess without communication with the testamentary guardian. I think it will be "better not to give him the control, but to give [*198] him information, in order that he may, if he thinks there is a case for it, come to the court for direction; and also that half-yearly accounts should be rendered to him, as to the mode in which the allowance has been expended for the benefit of the children; for I think that is a right which he has as testamentary guardian. This, I think, will give him as much control and superintendence as the testator intended he should have, while it will give effect to the expressed wish of the testator, as to the persons to whom the immediate care of the children should be entrusted.

Mr. *Parker* having on the part of the appellant acceded to the view of the case which his Lordship had suggested, the minutes of an order in conformity with it, and embodying also some minor details with reference to the education and management of the children, were discussed and settled on a subsequent day.

*CUTHBERT v. PURRIER.

[*199]

1847: Jan. 15.

A sum of money was set apart in 1815, to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837 the Master having certified, upon presumption, that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it, subject to the annuity. In 1842 the Master having certified, upon presumption, that she had died in 1822, and that no personal representative had been heard of, the court ordered immediate payment, to the same party, of the accumulation since that time. And in 1847 it ordered payment of the rest of the fund to the same party though resident abroad, upon his giving his personal security to refund, in case the annuitant or her personal representative should ever establish a claim.

A TESTATOR who was resident in India, by his will directed

1847.—Cuthbert v. Parrier.

his executors to set apart a sum of 30,000 rupees, the interest thereof to be paid to Fizum Meerum, a native girl who had lived with him, during her life, and on her death the principal to devolve to his son.

The testator died in the year 1809. The annuity to Fizum Meerum was regularly paid by the sole acting executor in India up to August 1815, when he died, having appointed two persons named Ranken and Gall his executors.

In 1817 this suit, which had been instituted for the administration of the testator's estate, came on to be heard for further directions, when a sum of about 3500*l.* stock was carried over to a separate account, to answer the legacy and interest thereon from August 1815, with a direction that the dividends should be paid to Ranken and Gall, to be by them applied according to the trusts of the will. Those persons, however, never applied for payment of the dividends, and nothing more having been heard of Fizum Meerum, an order was made in 1829, on the petition of the testator's son, who was entitled to the funds subject to the annuity, for the investment and accumulation of the past and future dividends.

[*200] "In 1833, the son presented a petition at the Rolls praying a reference to the Master, to inquire whether Fizum Meerum was living or dead ; and if dead, that the fund in court, including the accumulations, or so much thereof as the petitioner should be entitled to, might be transferred and paid to him, and a reference was directed accordingly ; in pursuance of which the Master in 1837 made a report, which, after stating the result of inquiries that had been made both by private correspondence and public advertisement, certified that upon due consideration of the evidence, he was of opinion, and did find, that Fizum Meerum was dead ; but that he was unable to state when she died, or who were or was her personal representatives or representative. The son then applied again for a transfer of the fund, but the Master of the Rolls refused to make any order unless the petitioner would give security to refund : and the Lord Chancellor upon appeal affirmed that order, as regarded the accumulations, but ordered a transfer of the principal sum without requiring any security.

1847.—Cuthbert v. Purrier.

In the year 1842, the son presented another petition, stating that he was resident at Paris, and had no friends in this country to whom he could apply to become security for him, and praying that the fund in court, or some portion of it, might be transferred to him without security. The Lord Chancellor (Lyndhurst) upon that petition referred it to the Master to say when or before what period Fizum Meerum had died; and the Master accordingly made another report, in which he stated that, notwithstanding every attempt had been made to find her, she had not been heard of since the 30th of August 1815, and he therefore found that she died on or before the 31st of August 1822. Upon that report his Lordship ordered a transfer of so much of the fund in court as had arisen from the accumulation of dividends upon the principal fund, since the 30th August 1822, *and that the residue of the fund should not [*201] be transferred without notice to the petitioner.

This was a petition by the same party, for payment of the residue with its subsequent accumulations, amounting altogether to about 1900*l*.

Mr. *Jarvis*, for the petition, referred to *Dowley v. Winfield*.(a)

THE LORD CHANCELLOR made the order, on the terms of the petitioner giving his bond, to be approved by the Master, to re-fund, in case Fizum Meerum, or her personal representative, should establish a claim.

In the matter of *EAGLE*, a Lunatic.

1847: Jan. 22.

Securities belonging to a lunatic's estate ordered to be deposited with the Master, for the purpose of reducing the amount of the committee's recognizances.

MR LOVAT appeared in support of a petition by the next of kin of the lunatic, praying the confirmation of the Master's re-

(a) 14 Sim. 277.

1847.—*In re Eagle*.

port, approving of a committee of the person and estate, and that, in order to diminish the amount of security to be given by such committee, three securities belonging to the lunatic's estate, one being a bond for 20,000*l.* which was not yet payable, the other two consisting of a bond for 6000*l.* and a promissory note for 1000*l.* both of which were now due, but on all of which interest had been duly paid up to the present time, might be deposited for custody with the Master in lunacy.

THE LORD CHANCELLOR said he saw no objection to their being deposited for the purpose of reducing the amount [*202] of the committee's security; but that there was great objection to the money remaining in its present state of security, and as the consequence of depositing them would probably be that no further proceedings would be taken, the order should direct that the bond and promissory note, which were now payable, should be immediately called in.

HAVERFIELD *v.* PYMAN.

1847: Jan. 23.

On a motion for production of documents, it is for the plaintiff to show from the admissions in the answer that the documents relate to the contents of the bill as it stands when the motion is made. And, therefore, where after an answer admitting possession of certain documents relating to the matters mentioned in the bill, or some of them, the plaintiff amended his bill by striking out part of it, and then moved upon that answer, the motion was refused.

THIS was a motion to discharge or vary an order of the Vice-Chancellor of England, made after an amendment of the bill, for the production of documents comprised in two schedules to the answer to the original bill.

The original bill stated, that one of the defendants, a married woman, being entitled for life, to her separate use, to a certain farm, the legal estate in which was vested in three of the other defendants as trustees, she, on the 1st of March 1843, entered into an agreement with the plaintiff to grant to him a lease of

1847.—Haverfield v. Pyman.

the farm for seven years from the 25th then instant, at a certain yearly rent, it being thereby amongst other things provided, that the plaintiff should keep the premises in substantial repair, according to the terms of the then tenant's lease, and that he should have the benefit of all the repairs which that tenant was bound by his lease to perform.

The bill then set forth in considerable detail a narrative of certain disputes which had arisen between *the [203] parties as to the nature of the repairs to be done by the plaintiff, and the amount which he was to receive towards them from the outgoing tenant, with the particulars of certain communications between him and the plaintiff on the subject; and also stated amongst other things, that the defendants, the trustees, had brought an action against the late tenant for non-performance of his repairs, and another against the plaintiff, for the rent which had accrued due since he entered upon the farm; and it prayed specific performance of the agreement, and an injunction.

In answer to the several charges as to documents, the defendants, the trustees, admitted that the documents mentioned in the first schedule were in their possession, and that they related to the matters mentioned in the bill, or some of them. And one of the defendants, who was a solicitor, made a similar admission as to the documents in the second schedule, but added that they were letters which had passed between the defendant, the married woman, and himself as her solicitor, since the disputes in question had arisen, and in reference thereto, and he therefore submitted that they were privileged.

After the answers had been put in, the plaintiff amended the bill by striking out the prayer for the injunction, and all the statements in the body of the bill relating to the disputes and communications about repairs, &c., and to the actions, leaving nothing but what was necessary to sustain the prayer for specific performance; and upon the bill as so amended the Vice-Chancellor's order was made.

Mr. *James Parker* and Mr. *Hetherington* for the appeal motion.

1847.—*Haverfield v. Pyman*.

Mr. *Rolt*, *contra*.

[*204] *On the question of privilege, *Jones v. Pugh*,^(a) *Stratford v. Hogan*,^(b) *Flight v. Robinson*,^(c) were cited.

THE LORD CHANCELLOR, having asked, whether the memorandum of agreement was among the documents, and being answered in the negative, said :—In the absence of authority, I am not disposed to lay down a rule which I think would lead to great inconvenience. A party files a bill stating a variety of circumstances, and requiring an answer as to documents relating to the matters therein mentioned. He then strikes out a great part, confining his bill to a portion only of what it before contained. On a motion of this kind, it is for the plaintiff to show that the documents relate to the contents of the bill as it stands when the motion is made ; for he asks the court to act upon an admission in the answer, and there is no admission in this answer that any of the documents relate to the matters at present contained in the bill as amended. It is said that that is the defendant's fault, and that if any of the documents relate exclusively to matters which are expunged from the bill, he ought to have put in a further answer and to have so stated. But I think it is the plaintiff's fault. He might have moved before he amended the bill, or he might have required a further answer to his interrogatory in the amended bill ; and he is not without remedy, for he may amend his bill again for that purpose. At present I have no means of ascertaining whether the documents refer to matters in the bill as it stands, or only to that part of it which has been struck out.

[*205] *But independently of this, there is another question of considerable importance—how far the plaintiff was entitled to the production of documents which cannot be material to him, at least in this stage of the suit ; for the bill, as it stands, makes no case as to repairs : all the plaintiff now asks is specific performance, and for that purpose he only wants the agreement

(a) 1 Phill. 96.

(b) 2 B. & B. 164.

(c) 8 Beav. 22.

1847.—*Haverfield v. Pyman.*

which he has got, and which is not among those documents. But I say nothing about that, or about privilege; for I am not satisfied, on the admission in the answer, that the defendant has any documents in his possession relating to the case made by the present bill.

Order discharged.

MORRIS v. MORRIS.

1847: Jan. 28, 29.

It is no objection to the publication of depositions which have been taken in a suit to perpetuate testimony that the proceedings, for which they are required, are in the court of a foreign country, or that other depositions taken in a similar suit in that country have already been published.

Semble.—This court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts.

THIS was a suit instituted in the year 1825, at which time the defendant was an infant, to perpetuate testimony in support of the plaintiff's title, in remainder, to lands in Ireland; the parties being then resident this country. A suit for the same purpose had been instituted by, and against, the same parties in the Court of Chancery in Ireland, in the year 1816; and witnesses had been examined in both causes.

The plaintiff's title had lately accrued in possession, and the witnesses being all dead, he moved before Vice-Chancellor Knight Bruce, for an order to pass publication in this suit, with a view to the evidence being used in a *suit [*206] which he had instituted in the Court of Chancery in Ireland to recover possession of the estate. The Vice-Chancellor having granted the motion, the defendant now moved to discharge his Honor's order.

It appeared that a similar order had been obtained in the Irish suit of 1816.

Mr. *Rogers*, for the appeal motion, said there was no case to be found in which the court had entertained a suit for perpetua-

1847.—*Morris v. Morris.*

tion of testimony, with a view to proceedings in a foreign court. That the jurisdiction of this court to compel discovery in aid of foreign proceedings, had been denied by the Vice-Chancellor of England in *Bent v. Young*,^(a) and that in *Del Rio v. Vallego*, which was cited by Lord Redesdale,^(b) as a solitary instance of a suit for such a purpose, it appeared from the registrar's book, that there were other obvious grounds on which the demurrer had been overruled. That the same principle applied to bills to perpetuate testimony, particularly in a case where the court in which the contemplated proceedings were to take place, had not only power to perpetuate testimony, but had actually done so. *Dun v. Coates*.^(c) If this court would perpetuate testimony for inferior courts—and the Vice-Chancellor had, in *Bent v. Young*, held that foreign courts were to be treated as inferior courts—why were there no instances of bills to perpetuate testimony for proceedings in the various inferior courts of this country—the court of Stannaries, or the court of Great Sessions in Wales, while they existed? The order in such cases^(d) was inapplicable to proceedings in foreign courts; for it directed [*207] that the proper officer "should attend with the original record and the original interrogatories and depositions, in the court where the evidence was to be read. Would this court send its officer or its records into foreign countries? This court had no judicial knowledge of the rules of procedure in Ireland, any more than in Russia or China. And would it be instrumental in furnishing evidence, without knowing in what way it was to be used, or according to what rules it was to be applied?

Mr. *Smith, contra*, with respect to the form of the order, referred to *Attorney-General v. Ray*,^(e) and *Abergavenny v. Powell*;^(f) from which last case it appeared, that the order in such cases (which had been adopted in the present) was simply, that the depositions be forthwith published. He also showed, that had the suit now pending in Ireland been instituted in this court,—as it might have been, though relating to land in Ireland,

(a) 9 Sim. 180.

(c) 1 Atk. 288.

(e) 3 Hare, 335.

(b) Tr. Pl. p. 151, 2d ed.

(d) 2 Hare, 519.

(f) 1 Meri. 424.

1847.—*Morris v. Morris*.

if the parties had happened to be here,—the depositions now in question would clearly have been available, and the decree obtained here would have been enforced by the courts in Ireland; *Houlditch v. Donegal*:(a) and it would be strange if, under these circumstances, the same evidence could not be used in a suit instituted in the first instance in Ireland.

Mr. Rogers in reply.

THE LORD CHANCELLOR said he would look into the authorities before he disposed of the case, as the question was of great importance and apparently very bare of authority.

*On the following day, his Lordship said he understood the case to have been presented to him as one free from difficulty, but for the objection which had been raised, that the proceedings in which the evidence was wanted were in Ireland. That he had looked at the authorities which had been cited, and he could find no ground for any such objection. The authorities, so far as they touched the subject at all, were rather the other way. *Del Rio's* case was a bill of discovery, which was very different. There the objection was taken by demurrer. Here no objection was made, or could have been made in that form. The evidence had been taken, and the only question now was whether it should be published. How far attention was to be paid to it when produced, was a question for the consideration of the court where the proceedings were to take place. It was for that court to exercise its discretion, whether to use or not to use the depositions; the question here was merely as to their publication, and the witnesses having been examined, and being dead, every thing required for publication was complete; and, therefore, the Vice-Chancellor's order was right.

Motion refused with costs.

(a) 8 Bl. N. S. 348.

 1847.—*Haines v. Taylor.*

[*209]

**HAINES v. TAYLOR.*

1847 : Feb. 1.

The circumstance that a party is commencing operations avowedly for a purpose which another conceives to be injurious to him and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the court either to form its own opinion as to the legality of the meditated purpose or to put that question into a course of immediate trial ; and, therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused.

THE defendants were the directors of a company, which had taken a lease of a piece of land in the immediate neighborhood of the plaintiff's house, for the purpose of establishing gas works, in which the manufacture was to be carried on upon the principle of an invention which was still a secret, but for which one of the defendants was about to apply for a patent, and by which it was announced that all the noxious and disagreeable effects upon the atmosphere, usually attendant on such processes, would be obviated.

Upon the defendants proceeding to lay the foundation of their works, this bill was filed to restrain them ; and a motion was shortly afterwards made for an injunction, before the Master of the Rolls. But, it being impossible to form any opinion as to whether the intended works would be a nuisance or not, or even to put that question into a course of inquiry, until the defendant's supposed invention should be made public, his Lordship directed the motion to stand over generally.

Mr. *Bethell*, Mr. *Heathfield*, and Mr. *Webster*, on behalf of the defendants, now moved before the Lord Chancellor, that that order might be discharged, and that the motion before the Master of the Rolls might be refused with costs.

Mr. *Roupell*, Mr. *Rolt*, and Mr. *Welford*, *contra*, relied
 [*210] upon the observations of Lord Eldon in **Birmingham Canal Company v. Lloyd*,^(a) in which an injunction to

(a) 18 Ves. 515.

1847.—Haines v. Taylor.

restrain the working of a mine was refused, on the ground of the delay in applying for it after notice that the defendants had commenced certain preliminary operations: from which they argued, that, if in the present case the plaintiff, hearing that the defendants were expending money in the erection of their works, had waited till the nuisance had actually arisen, he would have been told, on applying for an injunction, that he was precluded from seeking such relief by his acquiescence. And if so, it could not be said that the present motion was altogether without foundation, although the defendants, by holding back their alleged invention, prevented the court from immediately adjudicating upon the character of their works.

THE LORD CHANCELLOR.—In this case it is admitted that the court cannot, under present circumstances, either at once interfere by injunction, or put the question between the parties into a course of trial at law. It is therefore the ordinary case of a party applying to the court by a motion, and its being found, when the matter comes to be discussed, that the court can grant no relief.

The Master of the Rolls seems to have thought, that, by refusing the motion, he would have been prejudicing the merits, if at any future time the circumstances might enable the parties to try the question between them; but I cannot so understand it. The motion hanging over the heads of the defendants would be much more likely to prejudice them, than refusing the motion would be likely to prejudice the plaintiff. The court refuses the motion, not because it has formed "an opinion" [211] as to the legality of what it is alleged that the defendants are about to do, but simply because the plaintiff has not brought before it circumstances which enable it to interfere between the parties. If there were really any prejudice to be apprehended from such a course, it might have been obviated by refusing the motion without prejudice to any new application; and the court would certainly be anxious not to prejudice the case; but it does not appear to me necessary for that purpose, that the order should be so guarded.

The defendant says he has invented a new mode which will

 1847.—Haines v. Taylor.

obviate the inconveniences hitherto experienced from the manufacture of gas. And it is suggested, that he ought to have some peculiar stress of the jurisdiction laid upon him, because he prevents the present trial of the question, by refusing to disclose the nature of that invention. But has he not a right to conceal it? and why is he to be more harshly dealt with, because he merely exercises that right?

As to what Lord Eldon is supposed to have said in the case that has been referred to, he could only have meant that the party ought to apply as soon as he had something to apply about, and not that he should come for an injunction, with a certainty of having his motion refused. There can be no laches, delay, or acquiescence, where there is no injury to acquiesce in. Lord Eldon's doctrine, as applied to this case, would be this—the plaintiff has no right to come to the court for an injunction; he cannot get it; and yet he was bound to come and ask for it—Lord Eldon cannot have meant that. The proper order in this case, would have been to refuse the motion. As to the costs, I inquired whether the plaintiff had had any intimation before [212] he gave his notice of motion that the defendants "were not going to adopt the usual course in their manufacture, but one which professed to obviate all inconvenient consequences. And it appears, I find, from the affidavits, and from the bill itself, that had been communicated to him. Under these circumstances, I think that the motion ought to have been refused with costs.

HEMING v. DINGWALL.

1847: Feb.

A bill of discovery is not within the 12th order of May, 1845, unless it be a cross bill in aid of a defence to an original bill.

HEMING and Stevens, as executors, instituted this suit against the defendant, Dingwall, for an account in respect of certain building transactions, which they alleged he had conducted as

1847.—Heming v. Dingwall.

servant to their testator. Dingwall, on the other hand, insisted that he had not acted as the testator's servant, but that he was a master builder, and that certain bricks and other property which the plaintiffs claimed as belonging to the testator's estate were his own: and he brought an action against Heming as executor (Stevens being abroad) for the amount of his bill for work done by him for the testator in that character; and shortly afterwards filed a bill of discovery against the same party, not referring to the original bill filed against himself, but stating that he required the discovery in aid of his action at law.

Heming having answered that bill, obtained an order *ex parte* for payment of the costs of it; which order, however, was afterwards discharged by the Vice-Chancellor of England for irregularity, on the ground that the case was within the 125th order of May 1845, which provides that "the costs of a bill of discovery filed *by any defendant to a bill for relief [*213] are to be costs in the original cause, unless the court otherwise orders;" and, consequently, that the costs of the bill in question ought to have abided the result of the suit of *Heming v. Dingwall*.

Mr. *Rolt* now moved to discharge the Vice-Chancellor's order, contending that the 125th general order of May related only to cross bills in aid of a defence to an original bill; whereas, this bill was, on the face of it, in aid of a different proceeding, and took no notice of the other suit.

Mr. *Stuart, contra*, contrasted the order in question, which spoke of a bill of discovery generally, with the corresponding order (the 41st) of August 1841, which spoke only of a *cross* bill: independently of which, they argued that this was in substance, though not in form, a bill in the nature of a defence to the other suit, their client's case in the action being the same as his case in that suit. But, thirdly, they contended that, whether they were right in the former points or not, the order for taxing costs ought not to have been obtained *ex parte* without stating the fact, that the plaintiff and defendant in that suit were respectively defendant and plaintiff in another suit then pending and

1847.—Heming v. Dingwall.

relating to the same matter; and that the suppression of that fact would alone justify the discharge of the order.

THE LORD CHANCELLOR.—The defendant to a bill of discovery, having put in a full answer is, according to the ordinary practice, entitled as of course to the costs of that suit. The order in question, therefore, is regular, unless it comes [*214] within the general order of May 1845. If it does not come within it, the party had nothing to do with the general order, and therefore suppression is out of the case, and the only question is, what is the construction of the 125th order of May.

I am clearly of opinion, that it is not applicable to any case but that of a cross bill in aid of a defence to an original bill; for otherwise it would apply to all bills that any person, in the situation of a defendant in an existing suit, might have occasion to file against the plaintiff in that suit, whatever might be the subject of them. It is true, that the term "cross bill" which occurs in the corresponding order of 1841, is not to be found in this order: but in both the costs are to be costs "in the original suit:" assuming, therefore, that the two suits are connected.

It is said, indeed, that this is a cross bill: but the language of every bill is to be taken most strongly against the pleader; a party filing a bill of discovery is bound to state the purpose for which he wants the discovery; and this bill expressly states that its object is to aid the plaintiff in his action.

As the order, therefore, only refers to a bill in aid of a defence to another suit, and as this bill is not of that nature, I think that the *ex parte* order was regular, and that the order which set it aside must be discharged.

1847.—Spencer v. Allen.

*SPENCER v. ALLEN.

[*215]

1847: Feb. 12.

Where a writ of *fi. fa.* issued under the general orders of May, 1839, has failed to satisfy the demand, another writ may issue into another county.

MR. C. HALL asked that a second writ of *fi. fa.*, under the orders of May 1839, might issue into a different county from the first, the levy under the first not having satisfied the demand for which it had issued. He stated that, being the first application of the kind, the clerk of records and writs had doubted whether he had authority under those orders to issue a second writ under such circumstances.

THE LORD CHANCELLOR.—The object of the orders was to put the party in the same position as a plaintiff at law. Therefore let a new writ issue into the other county: for that is the course at law, where the first writ has not satisfied the demand.

*BRIGHT v. NORTH.

[*216]

1847: Jan. 30; Feb. 13.

Under an Act of Parliament by which the conservators of river banks were empowered to apply the funds under their control, (which were raised by a rate upon the proprietors of adjacent lands,) "in doing, constructing, and executing all such works, acts, matters, and things as they should from time to time deem necessary, proper or expedient for putting the bank into and maintaining the same in a permanent state of stability." Held, that they were authorized to apply a portion of the fund in watching and, if necessary, opposing, a bill in parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence.

THIS was an appeal from an order of the Vice-Chancellor Knight Bruce, overruling a general demurrer to the bill for want of equity.

1847.—Bright v. North.

By an Act of Parliament, passed in the first year of the present reign, to provide for the better conservation of the banks of the river Ouse, in the county of Norfolk, the lands adjacent to the banks at each side were divided into six districts, and it was provided that the portion of the banks comprised within each district should be maintained by commissioners to be appointed from among the owners of lands of a certain quantity within such district, by means of funds to be levied by a district rate, not exceeding 3s. an acre in each year; and the fund so raised was to be applied "in making, doing, constructing, and executing, all such works, acts, matters, and things, as by such commissioners should from time to time be deemed necessary, proper, or expedient for putting so much of the bank as was situate within their respective districts into and for maintaining the same in a permanent state of stability;" and it was expressly provided that the commissioners of any one of the districts, or the owners of land within such district, should not be liable to maintain or repair, or to contribute to the maintenance or repair, of any part of the banks out of such district: but that the commissioners of each district should alone be liable for their own acts, and answerable for the maintenance and repair of their [*217] own portion of bank only; nor should *any of the funds to be raised as aforesaid be applicable to any works other than those of, or for the benefit of, the district for which the same were assessed and raised.

In addition to this board of district commissioners there was constituted by the act another body of general commissioners," who were invested with a general superintendence over the banks of all the districts, and with power to order any works to be done for the uniform maintenance and repair of the banks which they might consider necessary, and their orders were in all cases to be conclusive and binding on the district commissioners.

The bill, which was filed by three landowners of the second district on behalf of themselves and all other persons subject to be assessed under the act, within that district, stated, that a certain company, calling themselves the Norfolk Estuary Company, had lately been formed for the purpose of reclaiming from the

1847.—Bright v. North.

sea a large tract of land near the mouth of the river Ouse, by diverting the tidal water which had theretofore flowed over it, by narrow channels into the river, and had applied to Parliament for an act to enable them to carry their scheme into execution. It then stated that, at a meeting of the commissioners of that district, held shortly after the bill was brought in, and at which the defendants constituted the majority of the members present, a resolution was come to, that proceedings should be taken on behalf of the board for watching and, so far as might be necessary, opposing the bill in parliament, and for causing such provisions to be inserted therein as might be requisite for indemnifying the landowners within their district from any greater charge in respect of their banks, consequent on the works contemplated by the bill, than had been incurred on the average of the last eight years, "and that a rate of 6d. an [*218] acre within that district should be raised under the provisions of the act, for defraying the expenses of such proceedings; and that such expenses should in the mean time be paid out of the funds then in hand, which had arisen from previous rates. That, at another meeting, held a few days after, at which the same persons were the majority, it was resolved, that a sum of 150*l.* should be paid to John Platten, the chairman of the meeting, out of the funds then in the hands of the treasurer, to be applied by him for the purpose of the resolution passed at the last meeting; and that an order to that effect having been signed by the chairman, that sum was paid by the treasurer accordingly.

The bill then charged that the application of any part of the funds raised or raisable under the act to the purposes contemplated by the said resolution, was not within the powers of the commissioners; and, after suggesting a pretence by the defendants, that the scheme of the Norfolk Estuary Company was likely to be injurious to the banks of the river, it charged "that, whether the scheme was likely to be injurious to the banks or not, the funds received or receivable under the act in respect of the district in question, or any part of such funds, ought not to be, and could not be, legally applied for such purposes;" and it prayed a declaration accordingly, and that the 150*l.* might be refunded and replaced, and that the circumstances might be recti-

 1847.—Bright v. North.

fied by injunction from making any similar appropriation of the funds then in hand, or which might thereafter be received by them under the powers of the act to the purposes contemplated by the resolution.

Mr. *Rolt* and Mr. *Bunney*, for the defendants (the appellants,) relied on the word "maintaining," as implying an authority in the commissioners to take the necessary measures for preventing damages to the banks as well as for repairing damage when done; and they cited *Rex v. The Commissioners of the Tower Hamlets*,^(a) *Attorney-General v. Compton*,^(b) *Attorney-General v. Pearson*.^(c) They also took several objections to the bill, for want of parties; but which, as the demurrer was allowed on the merits, it is unnecessary to notice.

Mr. *Russell* and Mr. *Toller*, for the plaintiffs, argued, that opposing in parliament a project which might or might not be injurious to the banks (and the resolution showed that the commissioners themselves did not feel sure that the project in question would be so,) was too speculative a purpose to come within the description of those to which the funds were by the act made applicable.

THE LORD CHANCELLOR (without hearing a reply.)—The Vice-Chancellor says, he cannot find any authority in the act for the application of the fund under the control of the commissioners to the purpose stated in this bill. But the real question is, whether such an authority is not incident to the duties which the act imposes upon them. And I can only deal with that question upon the case stated in the pleadings.

The commissioners of each district are bound by the act to protect the lands adjacent to the banks from inundation, and they are authorized by the act to levy a rate on the proprietors of the district to defray those expenses. There being a
[220] project on foot affecting the river lower down, they call

(a) 1 B. & Ad. 232.

(b) 1 Y. & C. C. C. 417.

(c) 2 Coll. 581.

1847.—Bright v. North.

a meeting, at which they come to this resolution. [His lordship read the resolution.] That is a wise provision on behalf of all parties in that district. Apprehensions being entertained of the effects of the project upon this part of the banks, they direct certain persons to watch the proceedings in parliament. Now the bill does not state that the works contemplated would not be injurious to the banks within this district: but, on the contrary, it states, by way of pretence, that the scheme was likely to be injurious to the banks. There the plaintiffs state that the ground on which the defendants are proceeding, and there they charge that, whether the scheme was likely to be injurious or not, the funds received or receivable under the act, or any part of such funds, ought not to be, and could not legally be, applied for such purposes.

The bill, therefore, raises this proposition as to the construction of the act—that, however injurious the works may be, the commissioners are not authorized to expend one farthing of the money entrusted to their care, in preventing them. That being all that is alleged in the pleadings, and the rule being to take the case as strongly against the pleader as his statements will justify, I must assume that the works are likely to be injurious. Now, it is clear, that, if actual injury was done, and proper measures had been taken by the commissioners to prevent it, they would be entitled to be allowed their expenses so incurred; for every trustee is entitled to be allowed the necessary and proper expenses incurred in protecting the property committed to his care. But if they have a right to protect the property from immediate and direct injury, they must have the same right where the injury threatened is indirect but probable.

*I wish it to be understood, that I proceed entirely on [*221] the pleadings, and assume that they state a case in which the works contemplated are likely to be injurious to the banks of this district. And, on that assumption, although there is no direct authority in the act for the application of the funds to the proposed purpose, I think it is incident to the powers which are given to the commissioners and to the duties imposed upon them.

 1847.—Bright v. North.

Though I am of this opinion on the allegations of the bill now before me, yet, if the pleadings do not really raise the question in dispute between the parties (and I can hardly suppose that the bill was filed to decide such a question as this,) I should, subject to any thing I may hear from Mr. Rolt in reply, give the plaintiff leave to amend the bill.

Mr. *Rolt* not offering any objection, the demurrer was allowed, with leave to amend.

SMITH v. CHAMBERS.

1847: March 5.

The right of an apothecary to charge for attendances, is not matter of law, but of contract, either express or to be implied from the usage of that place.

Proof of improper expenditure of money by executors will not support a decree against them for an account on the footing of wilful neglect or default.

A bill by residuary legatees prayed an account against the defendants, the executors, on the footing of wilful neglect and default, but made no case of misconduct against them, except that they had improperly defended an action in which they had failed, and the costs of which they claimed to retain out of the estate. The court at the hearing, although of opinion that the action ought not to have been defended, gave the defendants their costs of the depositions which had been taken relative to that subject, on the ground that, having no connection with a case of wilful neglect and default, it was not a proper matter to be put in issue at that stage of the suit.

THIS was a suit by residuary legatees, some of whom were infants, praying that the defendants, the executors, might [*222] account for the monies received by them, "or which, but for their wilful neglect or default, they might have received; and that under the circumstances stated in the bill, they might not be allowed the costs incurred by them in defending a certain action, and which costs they had insisted on retaining out of the estate.

The bill contained no charge of wilful neglect and default, but it charged that the defendants had in several respects improvidently wasted and misapplied the assets, and, as evidence thereof, it charged that they had improperly, and in defiance of

1847.—Smith v. Chambers.

the expressed wishes of the adult plaintiffs, defended an action brought against them by the apothecary, who had attended the testator in his last illness, for £75 16s., the amount of his bill for medicines, attendance, and surgical operations; and in which action the plaintiff obtained a verdict and judgment against them, for a sum which (including £52 6s. paid into court) amounted to only £5 less than the amount of his original demand, with costs, which were taxed at £130 3s. 3d.

The defendants, by their answer, said that they had not defended the action, without first consulting several medical men of Bridport (where the testator resided,) and elsewhere, and who were all of opinion that many of the charges in the bill were exorbitant, and that £52, which they had always been willing to pay, was the full amount of what was justly due. With respect to the notice which, the bill alleged, had been served upon them by the adult plaintiffs, requiring them to pay the bill without dispute, they said that, independently of the fact that such a notice would have been no indemnity to them, as against the infants, they were the less inclined to attend to it, as it came through the same solicitor who was acting as the attorney for the plaintiff in the action.

*Both parties went into evidence as to the propriety [*223] of defending the action, and the depositions ran to a considerable length.

The £5 which was struck off the bill by the verdict, was for medicines, which were charged for, but of which the plaintiff in the action had, at the trial, failed to prove the delivery. The rest of the disputed portion of the bill was chiefly for attendances, which the defendants' medical witnesses, who were from Bridport, stated that it was not usual for practitioners, who supplied medicines, to charge for. Several medical witnesses for the plaintiffs gave evidence the other way, but none of them were from Bridport, or its neighborhood. It also appeared in evidence that the defendants' own attorney in the account had advised them before pleading to submit to the demand, rather than run the risk of costs.

By the decree of Vice-Chancellor Knight Bruce, before whom the cause was heard, it was declared that, in respect of the de-

1847.—*Smith v. Chambers.*

mand of £75 16s., the defendants were to be allowed the full amount thereof, but not any costs, charges or expenses, on either side in respect of the action; and if the defendant should claim to be allowed any other costs, charges and expenses in respect of such demand, the Master was directed, in considering such claims, to have regard to the question how far they had been properly incurred. And, after directing the usual accounts of what the defendants had respectively received, it further declared that they were not to be allowed any costs of this suit to the time of the decree, so far as the suit related to the said demand of £75 16s., or the said action, and were to pay to the plaintiffs the costs of the suit to that time, so far as they had been increased by the evidence on either of those subjects.

[*224] And the taxation of such costs, and all further *directions, and all other costs, were reserved until the Master should have made his report.

From those declarations in the decree the defendants appealed.

Mr. *Russel* and Mr. *Hargrave*, for the appellants, as to the right of a surgeon and apothecary to charge for attendances, cited *Handey v. Henson*,^(a) and *Morgan v. Hallen*.^(b)

Mr. *Rolt* and Mr. *Chambers* for the respondents.

THE LORD CHANCELLOR, (who had observed, in the course of the argument, that all the plaintiff's medical witnesses came from places at a distance from Bridport,) in delivering his judgment, said—

This is an unfortunate case. If it had not been for the advice given by the defendants' own solicitor, and the notice to them by some of the parties beneficially interested, I should have thought it clear, that they had sufficient reason for disputing the propriety of the charges; for it appears, from several witnesses, that the charges were not according to the practice of the town of Bridport. The right of a medical man to charge

(a) 4 Car. & Payne, 110.

(b) 8 Ad. & Ell. 489.

1847.—*Smith v. Chambers.*

for attendances is not matter of law, but of contract, either expressed or to be implied from the usage of the place; and therefore my conclusion, independently of the circumstances to which I have referred, would have been, that the charges were improper.

But, admitting that there was enough to justify the defendants in resisting such a claim in their own case, it may still be a question whether it was expedient and judicious, for parties who were administering the estate of others, to take such a course; for they might be pretty sure *that, even if they [225] succeeded, the extra costs of the action would exceed the amount in dispute, which was not more than £25; and, after all, they were not certain of success. There was, therefore, a certainty of paying extra costs, and a chance of losing the cause altogether. Under these circumstances, after the advice received from their solicitor, and the notice from some of the parties beneficially interested, I think the defendants were not justified, in point of discretion, in further resisting the demand. It is true the notice was suspicious, coming, as it did, from the solicitor of the parties making the claim; but taking all the circumstances together, I think it was not advisable to defend the action. And I should, therefore, not quarrel with the decision, making the personal representatives liable for these costs, and at the same time giving them the benefit of the £5 which was struck off. But it is quite clear that the way in which that is done by the decree is irregular; and I cannot suppose that the attention of the court was directed to it; for the decree, as it stands, allows the defendants more than it appears they have paid. I must, therefore, alter the decree in that respect, by declaring that the defendants are to be allowed £70 16s., the amount of the verdict, but they are not to be allowed the costs of the action, except £5, being the difference between the amount claimed and the amount of the verdict. That will explain the principle on which the £5 is allowed.

But then, there is the declaration as to so much of the costs of the suit as relates to this question. The case against the defendants is, that they injudiciously resisted an action by a creditor; and the object of the suit is to have the accounts taken,

1847.—Smith v. Chambers.

and that the executors might not be allowed those costs. For that purpose the bill prays an account on the footing of wilful neglect and default ; but the case stated has nothing to do with wilful neglect and default ; it is simply a case of injudicious [*226] expenditure, and *not of money lost for want of proper means being taken to recover it. The plaintiff, therefore, failed on the case of wilful neglect and default ; but the result of putting it into the bill has been the examining of a number of medical and other witnesses, which has occasioned a great part of the expense of the suit. The pleadings afforded quite sufficient foundation for an inquiry whether those expenses in the action were properly incurred, without going into any such evidence. All the expense of this evidence is occasioned by the plaintiff, and then he asks that the defendant may pay the costs incurred by that irregular proceeding on his part. It is true that, if the case had been presented in the regular way, the defendants would have had to bear the costs of the inquiry ; and, therefore, they may be better off now, with the decree I propose to make, than if the plaintiff had taken the regular course : but that is the plaintiff's own fault. The strictly proper course, perhaps, would be to dismiss the bill as to this claim ; but, if I did that, the parties would have to go before the Master, and litigate the same thing over again. On the other hand, to sanction a decree like this would be not only injurious to the defendants in this suit, but detrimental to the suitors of the court generally ; for if plaintiffs are entitled to introduce into their bill an objection to one particular item of an executor's account, why not to all ? Nothing could be more injurious to suitors than such a course of proceeding. The decree which I propose to make will mark my opinion of it ; and it will be this :—I leave the declaration as to the £75 16s. with the qualification which I have mentioned ; and, instead of making the defendants pay the costs referred to in the subsequent clause, declare that the defendants are entitled to their costs of the depositions, relative to the sum of £75 16s. in the pleadings mentioned, and *that* on the ground that that item has been irregularly introduced into the bill : subject to that, reserve the costs, generally.

1847.—Chappell v. Purday.

CHAPPELL v. PURDAY.

[*227]

1847: March 20. April 14.

The rule which prohibits an appeal for costs alone is confined to those cases in which the correctness of the decision as to costs cannot be judged of without re-hearing the cause upon the merits, and therefore does not apply to a case in which the error of such decision is apparent on the face of the decree or order appealed from. Where a bill to restrain an alleged infringement of a copyright is retained, at the hearing, with liberty to the plaintiff to bring an action, and the action is accordingly brought and fails, it is of course that the bill should be dismissed with costs, and, therefore, if dismissed without costs, it is error on the face of the decree.

IN this appeal from part of a decree of the Vice-Chancellor of England, the only question was, whether the case came within the general rule which prohibits an appeal for costs alone.

The bill stated that the plaintiff was entitled to the copyright of the opera of *Fra Diavolo*, and it sought to restrain the defendant from infringing it, with the usual account.

On the answer coming in, an injunction, which had been obtained *ex parte*, was dissolved, with liberty to the plaintiff to bring an action. Instead, however, of doing so, the plaintiff amended his bill, and, after the cause was at issue, filed a supplemental bill for the purpose of putting in issue matter alleged to have been recently discovered. Witnesses were examined on both sides, and the cause came on for hearing before the Vice-Chancellor of England, who directed that the bill should be retained for twelve months, with liberty to the plaintiff to bring such action as he should be advised, the defendant undertaking in the meantime to keep an account: and, in case the plaintiff should not bring such action within the twelve months, it was ordered that the bill should stand dismissed with costs to be taxed; but, in case he should bring such action, and proceed to trial within that time, the costs and all further directions were reserved until after such trial.

An action was accordingly brought, and a verdict having been found for the defendant, the cause came on [*228] for further directions, when the Vice-Chancellor dismissed the bill, but made no order as to the costs of the suit;

1847.—*Chappell v. Purday*.

and for that omission the defendant brought the present appeal, insisting that, as the bills proceeded solely on a supposed legal right which turned out to have no existence, the costs of the suit ought to have followed the result of it, according to the rule at law.

Mr. Anderton and Mr. Josiah Smith, for the Appellant.

Mr. Rolt and Mr. Chandless, for the Respondent.

THE LORD CHANCELLOR, (after stating the nature of the proceedings at law and in equity) said, that the two orders of the Vice-Chancellor's were totally inconsistent with each other, and could not stand together. The first was quite in accordance with the practice of the court; for the bill was retained with liberty to bring an action; but if the action was not brought within a limited time, the bill was to be dismissed with costs. An action, however, was brought; but the plaintiff failed; and on the cause coming on again the bill was dismissed without costs. It was difficult, however, to understand why the plaintiff should be in a better situation for having brought an action which had failed, than if he had not brought an action at all. It was said that the Vice-Chancellor, in ultimately refusing to give the costs of the suit, had been influenced by the conduct of the defendant in the action; but that was a matter for the consideration of the court of law, and ought not to have affected the decision of the case in this court; for the action and the suit were two distinct and independent proceedings, being no otherwise connected than as the result of the suit necessarily followed the result of the action.

[*229] *It had been said that this was an appeal for costs only, and that, therefore, it ought not to be entertained. But the rule was, not that there should not be an appeal for costs alone, but that the court of appeal would not go into a rehearing of the merits upon a mere question of costs.[1] If, however,

[1] For cases upon the question whether an appeal will lie to reverse the decisions of the court below, on a question of costs only, see *Winslow v. Collins*, 3 Paige, 88; *Buloid v. Miller*, 4 Paige, 473. See also *Angel v. Davis*, 4 Myl. & Craig, 360, n.

 1847.—Chappell v. Purday.

without going into the merits, it was apparent, on the face of the order itself, that the decision as to costs was at variance with a settled rule of practice, the court of appeal would set it right; and, being of opinion that the present was a case of that description, and that, so far as it related to costs, it was not only at variance with the established practice of the court, but inconsistent with the decree in the same suit, his Lordship thought that the appeal ought in this case to be allowed, and that, instead of the order made below, the bill ought to be dismissed with costs.

 SCOTT v. PLATEL.

1847: March 27.

Upon the Master's certificate that a receiver is in default, the four day order upon him is of course, and, therefore, a motion to discharge such order on the ground of error or irregularity in the certificate, but not directly impeaching the certificate itself, will be refused.

THE plaintiff and the defendant Buckle were appointed joint receivers in this suit. Buckle, who was entitled, beneficially, to

3, to S. C. 366; *Eastburn v. Kirk*, 2 John. Ch. R. 319; *Lewis v. Wilson*, 1 M'Cord Ch. R. 210. The rule that neither an appeal or re-hearing will not be sustained in relation to questions of costs, is confined generally to cases where the costs rest in discretion merely. But where costs are disposed of as matter of relief, or where they are given or refused contrary to statute, or the settled practice of the court, and appeal may be sustained. *Winslow v. Collins*, 3 Paige, 68. *Buloid and Wife v. Miller*, 4 Paige, 473. *Lain v. Loin*, 10 Paige, 191. Also where a party appeals on a substantial ground, as in a case where there is really a doubt as to the correctness of the decision of the judge upon the merits of the cause. The Appellate Court vary the decree as to costs, although the appellant should fail upon the substantial ground of appeal. See *Winslow v. Collins*, 3 Paige, 68; *Owen v. Griffith*, 1 Vesey, Sen. 250; *Cowper v. Scott*, 1 Eden R. 17; *Jenour v. Jenour*, 10 Vesey, 562; *Robertson v. Wendell*, 6 Paige, 320; *Taylor v. Popham*, 15 Ves. 72; *Wavis v. Waters*, 13 John. R. 500; *Attorney-General v. Butcher*, 4 Russell, 180. An appeal will not lie for granting or refusing interlocutory costs which are in the discretion of the court. See *Cotton Manuf. Co. v. Supervisors of Oneida*, 1 Barb. Ch. R. 432.

1847.—*Scott v. Platel*.

part of the present income, duly brought in his accounts ; but the plaintiff having omitted to do so, the Master declined to proceed upon the accounts so brought in by Buckle ; whereupon Buckle obtained the Master's certificate that the plaintiff had not brought in any accounts, and on the same day obtained also a four day order requiring him to bring them in or stand committed. But the Vice-Chancellor Knight Bruce having, on the motion of the plaintiff, discharged that order,

[*230] The defendant Buckle now appealed,

Mr. *Lee* and Mr. *Selwyn*, for the appeal motion, said, they understood the Vice-Chancellor to have proceeded in some degree on the ground that the party who obtained the four day order was himself a receiver in the cause ; and that a receiver ought not to institute proceedings.

THE LORD CHANCELLOR.—A party by being appointed receiver, does not thereby lose his privileges as a party to the cause ; otherwise, by appointing a party receiver, you would paralyse the proceedings in the suit.

His Lordship then asked the counsel for the plaintiff what the irregularity was which they relied on, observing that as the Master had certified that the plaintiff was in default, the four day order was quite of course.

Mr. *K. Parker* and Mr. *Hardy*, for the plaintiff, said that the ground on which the Vice-Chancellor had discharged the order was, that the receivers, acting under a joint appointment, were, by the terms of their appointment, bound only to account jointly, and, therefore, a four day order, founded on a certificate that one only had not brought in his accounts, was an attempt to enforce a duty which did not exist.

THE LORD CHANCELLOR.—Though they are joint receivers, each may have a separate account, for each is bound to account for what he individually receives ; but whether there be or be not separate accounts, the Master has certified that the

1846.—*Scott v. Platel.*

*plaintiff is in default: as long as that certificate stands [*231]—and the plaintiff does not, by this motion, impeach it—the four day order is quite of course. The order discharging it must, therefore, be discharged, with costs of the motion below.

ARNOLD v. GARNER.

1847: April 24.

A broker, having taken an assignment of several cargoes in trust to sell them on their arrival, and out of the proceeds to repay himself the amount of his advances, took possession of some of the cargoes, and sold them under the power in the deed, while the rest were sold under an order made in a suit instituted by him to enforce his security, by which it was directed that they should be sold by him in such manner and at such time as he and the receiver in the cause should agree, and, in the event of their differing, then as the Master should direct.

Held, that, in the latter sales, he was entitled to the usual commission allowed to brokers employed by the court: but that, in the former, he was not entitled to any commission, having sold as trustee.

THIS was a suit by several persons who were in partnership as brokers at Liverpool, against the widow and executrix of one Joseph Garner deceased, who had carried on business there as a merchant and ship-owner. And the object of the suit was to realize certain mortgages of several ships and cargoes, which Garner had executed to the plaintiffs, for securing the repayment of advances, which they had from time to time made to him.

By the mortgage deeds, which were all in the same form, the property respectively comprised in them was assigned to the plaintiffs in trust to sell; and, out of the proceeds, in the first place to pay the costs of the indentures, and all costs and charges attending the execution of the trusts; and in the next place, to retain to themselves the amount of the advances with interest, and to pay the surplus to Garner.

*On a motion for an injunction against the defendant [*232] who had possessed herself of the bills of lading of one

1847.—Arnold v. Garner.

of the cargoes, an order was made on the 26th of July 1844, by which it was referred to the Master to take an account of what was due to the plaintiffs on their securities, and it was ordered, that possession of one of the ships which had then returned from her voyage, and of the two others with their cargoes when they should arrive, and also the said bills of lading, should be delivered to the plaintiffs ; and that the ships and cargoes which remained unsold should be sold by them, in such manner and at such time or times as they and the receiver, already appointed in a creditors' suit for the administration of Garner's estate should agree upon ; but in case they should differ about the same, then it was ordered that the said ships and cargoes should be sold with the approbation of the Master : and that the purchase monies should be received by the plaintiffs, who were to pay the balance thereof after deducting the expenses of and incident to the sales into court.

In taking the accounts under that order, the plaintiffs claimed a *del credere* commission of four per cent. on the sales made by them, of the ships and cargoes comprised in their securities, since Garner's death ; one of which sales was made before the institution of this suit. and the others subsequently, under the order of the 26th of July 1844. That claim was allowed by the Master as to both classes of sales : but his decision was reversed by Vice-Chancellor Wigram, who disallowed the claim to commission altogether.

The plaintiffs now appealed from his Honor's decision.

[*233] *Mr. Walker and Mr. Eddis, for the appellants.

Mr. Romilly and Mr. Prior, for the respondent.

It was contended, on the part of the appellants, that the commission in question was part of the costs and charges of executing the trusts ; and that they were therefore entitled to it by the terms of the deeds. But the ground on which they mainly rested their case, was the course of dealing which had existed between them and Garner ; it appearing that for several years prior to the date of the securities in question, the plaintiffs had

1847.—Arnold v. Garner.

been in the habit of making advances to Garner on similar securities, and of selling the homeward cargoes on their arrival, and that in all the accounts which they had delivered to him up to within a year of his death, they charged the commission now claimed, which had always been allowed them. There was also in evidence a letter written by the defendant as executrix of her husband, a few days after his death, authorizing the plaintiffs to make further advances for the purpose of completing one of the cargoes which was then in course of shipment, and containing, as they contended, an assent on her part to the continuance of the same course of dealing in the transactions then pending; but which letter was upon that point ambiguous in its terms. It was further, however, contended that the authority to charge commission, supposed to be implied by the previous course of dealing, required no such confirmation; and that it was not revoked by the testator's death, inasmuch as the plaintiffs had made the advances upon the faith of it: *Hammonds v. Barclay*.^(a)

*On the other hand, it was insisted that there was no [234] contract for commission, either in the terms of the deeds or in the letter, and that the plaintiffs had been allowed the commission by the testator, only because they had sold the property as his broker; but that if he had refused to employ them as such, and, in consequence of such refusal, they had taken possession of the property in their character of mortgagees, as they had done here, they could not have charged commission.

In answer to a question from the court, whether the commission claimed was the customary rate of brokers' commission it was stated, that it appeared in evidence, that the ordinary rate of brokers' commission on sales was $2\frac{1}{2}$ per cent., but that, where they had made advances, a higher rate, varying according to circumstances, was usually allowed.

THE LORD CHANCELLOR.—The plaintiffs in this case being brokers, and willing to make advances on the cargoes of several ships belonging to the late Mr. Garner, (counting, no doubt, upon the advantage which they expected to derive from being bro-

(a) 2 East, 227.

1847.—Arnold v. Garner.

kers,) took a security, by which they were authorized to take possession of the property and sell it. Then there is a collateral agreement between Garner and the plaintiffs, by which he agrees to employ them as his brokers in the sales, at a rate exceeding the usual rate of brokerage. All that is perfectly intelligible. The plaintiffs when they made their advances, looked to the advantage to be derived from selling the property as brokers. All went on regularly during Garner's lifetime. At his death one of the vessels had just arrived; three others [235] were on the voyage, and *arrived afterwards; the remaining one had not sailed; she was only in preparation for her voyage: but there is no appearance of any intention on the part of the widow to change the previous course of dealing with respect to that ship. All the ships however, having now arrived, and having been sold, the question is, what remuneration by way of brokerage the plaintiffs are entitled to.

As to the first ship which they sold, the evidence is, that they took possession of and sold it, and received the money without communicating with any one; acting, of course, under their power in the deed. Taking therefore possession, and selling by that title, although they were brokers, they could not charge brokerage as against the *cestuis que trust*: for, although they were entitled to all outgoings as trustees they were not entitled in that character to commission for the discharge of a duty which, as such trustees, they were bound to perform. That is a familiar and well established rule of this court. Therefore, as to that ship, I think the disallowance of the claim is right.

But with respect to the others, the case is different. If, on the one hand, they had sold these cargoes as they had been in the habit of doing on previous occasions, they would have had a strong case for claiming the benefit of the arrangement with respect to brokerage which existed between them and the testator; for I think the contract was not altered by his widow after his death. But their difficulty is, that that is not the case; for these cargoes were not sold under the contract as to brokerage subsisting between them and the testator, or under any new contract with his personal representative to a similar effect. The sales

1847.—*Arnold v. Garner.*

were under the order of the court, which directed that the plaintiffs should sell at such time and in such manner as they and the receiver should agree upon. If the plaintiffs had thought proper to take possession as mortgagees, they would have been at liberty to sell in any way and at any time they thought fit; but they were willing to forego their title under that mortgage deed, and to take such protection as this order gives them. [*236]

Then the question is, whether brokers being directed by the order of the court to take possession of property for the purpose of selling it, are not entitled to the ordinary remuneration, merely because they happen to be mortgagees. No authority has been referred to for such a proposition, nor does there appear to me to be any reason for so deciding. I think, therefore, that, as to all the sales, except the first, the plaintiffs are entitled to the ordinary commission of brokers employed under the authority of the court; but that as to the first sale, in which they sold as mere mortgagees, and not under the direction of the court, they are not entitled to any brokerage. I shall, therefore, refer it to the Master to inquire what brokerage they are entitled to for having sold the other cargoes under the authority of the court.

FISHER v. FISHER.

1847: May 22.

The rule that a plaintiff cannot be examined as a witness in the cause is an absolute rule of practice, not depending on the question whether in the particular case he may or may not be liable for costs.

THIS suit, which was instituted for an account, having, after answer, become abated, in consequence of the sole plaintiff having obtained a protecting order under the 7 & 8 Vict. c. 96, the assignees, in whom all his property thereupon became vested, filed a bill of revivor and supplement; and the cause being at issue, they applied to Vice-Chancellor Wigram for leave to examine the original plaintiff as a witness, [*237]

 1847.—*Fisher v. Fisher*.

saving just exceptions ; it appearing on affidavit that he had released all interest in the surplus of his estate. The Vice-Chancellor refused the motion, considering himself bound by the case of *Hewatson v. Tookey* ; (a) but recommended an application to the Lord Chancellor.

The motion was accordingly now renewed, by way of appeal, before his Lordship.

Mr. *Russell* and Mr. *Sidney Smith* for the motion.—The ground of the decree in *Hewatson v. Tookey* was, that the party, notwithstanding his bankruptcy, remained liable for costs. But that ground no longer exists ; for, by the modern practice, if a plaintiff becomes bankrupt, and his bill is dismissed, it is always without costs, even when the assignees decline to take up the suit ; and, *a fortiori*, he is exempt from liability for costs, where the assignees elect to prosecute the suit ; for it would be unjust to hold him liable to any extent for the costs of a suit, over the conduct of which he has no control.

[THE LORD CHANCELLOR—If it be true that there is no case to be found in which a bill has been dismissed with costs against a plaintiff who has become bankrupt or insolvent, it must be, because it has not been thought worth while to ask for costs against a party who is evidently unable to pay them. But the question is, whether he is not liable ; and it is quite clear, that in the case of an insolvent at least, the costs, up to the
[*238] time of his insolvency, would be a debt to *which not his person, perhaps, but his estate, would remain liable.]

The costs would not constitute a debt, without at least an order for payment of them ; and, according to modern practice, no such order is ever made.

In *Haws v. Hand*, (b) a party who had been examined as a witness in the original cause, afterwards, on the death of the plaintiff, revived the suit as his executor, and his evidence was, nevertheless, allowed to be read at the hearing.

(a) 3 Dick. 799.

(b) 3 Atk. 615.

1847.—*Fisher v. Fisher*.

[THE LORD CHANCELLOR.—There, his evidence was taken when he was no party, and disinterested.]

In *Ewer v. Atkinson*,^(a) where three plaintiffs had become bankrupts, and obtained their certificates, on a motion by their assignees, who had revived the suit, for leave to examine one of them as a witness, Lord Kenyon, Master of the Rolls, allowed him to be examined, only directing that the bill should first be amended by striking him out from being a plaintiff.

[THE LORD CHANCELLOR.—It is quite clear that in that case, it was considered that as long as he remained on the record as plaintiff, he could not be examined.]

Lord Kenyon, in *Ewer v. Atkinson*, said he could not comprehend why a plaintiff who had become bankrupt, should remain on the record when his interest in the suit was transferred to his assignees. And in truth, the *only [*239] reason for keeping him there, is to identify the cause : but he is substantially no more a party to the cause than if he were naturally dead.

[THE LORD CHANCELLOR.—Your difficulty upon that is, that if he is not to be considered as a party, you need not apply for an order to examine him.]

The application is necessary only as a matter of form, because he is, in point of form, a party. The only effect of refusing it in a case where the evidence is really of importance, would be to compel the assignees to dismiss their bill, and commence a suit of their own *de novo* : for, in such a suit, it is clear that the party would be a competent witness. Lord Denman's Act has put an end to the incompetency of witnesses, on the ground of interest. and it is submitted that the courts ought to modify their practice in conformity with the spirit of modern legislation.

(a) 2 Cox, 393.

 1847.—*Fisher v. Fisher*.

THE LORD CHANCELLOR (without calling upon the other side) said—There is no great reason why the practice should be so strict, as not to allow a plaintiff who has become insolvent to be examined as a witness in the suit, when revived by his assignees; and it may be that a different practice would be more convenient; but that is not now the question. The question is, what is the existing practice. It has been suggested, that Lord Denman's Act has varied the old practice; but that Act went [240] only to objections founded on interest; (a) whereas *the objection, here, is that the party is a co-plaintiff, and not at all on the score of interest. I inquired during the argument for cases in which a plaintiff had been examined by co-plaintiffs: but in the only case that was produced, the witness was not a party and had no interest when he was examined, and, therefore, that case has nothing to do with the general question. It appears, therefore, that there is no case in which a plaintiff has been permitted to be examined by his co-plaintiffs. That rule has been impressed upon my mind for very many years, and that impression has not been altered by the present discussion. Such being the practice, the only question is, whether the insolvent is to be considered as a plaintiff on the record. That question was distinctly raised in *Hewatsan v. Tookey*, where Lord Kenyon in the first instance made the order, on the authority of a decision of Lord Northington's; but when it came before Lord Thurlow, Mr. Dickens says, "The Lord Chancellor reprobated that decision, and said, that it was against all rule and principle;

(a) It should be observed, though it was not noticed in the argument, that Lord Denman's Act expressly provides (6 & 7 Vict. c. 85,) "that it shall not render competent any party to any suit, action, or proceeding, individually named on the record." It is, therefore, only on the supposition that a plaintiff who has become insolvent virtually ceases to be a party to the suit, although in point of form his name is left upon the record, that this act could help the case. And it would seem that that supposition cannot be made, except upon the assumption that a party so circumstanced is not only divested of all interest, but exempt from all liability to costs; in which case there would, of course, be no occasion for calling the statute in aid. Indeed, the statute was not referred to in the argument, as having any direct bearing upon the case, it having been more than once admitted by the counsel for the appellants, that, if the insolvent remained under any liability to costs, there was no ground for the application.

1847.—*Fisher v. Fisher.*

that the practice was clearly established,"—and he discharged the order.

Much may, no doubt, be said against the accuracy of many of the reports in Dickens; but there are many of "them, in which he himself interfered and made sug- [*241] gestions to the court. And I have always considered these cases of higher authority than the rest, because you have there an opportunity of seeing what was suggested by a very experienced officer, and what the court did in consequence.

Lord Thurlow, then, in the case to which I have referred, appears to have considered Lord Kenyon's order as contrary to the practice. And it is remarkable, that in *Ewer v. Atkinson*, which occurred nine years afterwards, we find the same Judge who had made that order in 1785, taking a different view of the practice from what he appears to have done on the former occasion; for on a similar application for leave to examine one of three plaintiffs who had become bankrupt, he thought it necessary, before granting the leave, to direct that the bill should be amended by striking out that party from being a plaintiff. I say nothing of the propriety of making such an order; but it shows, at least, his impression, that as long as the party remained a plaintiff on the record, it was impossible to make him a witness.

Now, then, there being no question of interest, and therefore Lord Denman's Act being out of the question, I find a practice established for upwards of sixty years. If it is to be altered, it must be by some general order; for it would be very inconvenient to alter the practice from time to time, merely because a particular Judge may think it inexpedient. I refuse this application, because I find it contrary to the established practice; and because Lord Denman's Act contains nothing to alter that practice.

1847.—In re Gordon.

[*242] *In the Matter of JOANNA GORDON, otherwise COUNTESS OF STAIR.

1847: Jan. 22.

The Lord Chancellor will not in general supersede a commission of lunacy after verdict, without seeing the lunatic.

A commission cannot be superseded as to the person of the lunatic, and at the same time continued in force as against the parties accountable for the lunatic's estate.

But a lunatic who has recovered will be allowed, without superseding the commission, to have the control of his fortune, and to superintend the prosecution of accounts against accounting parties without the intervention of the committee.

In this matter an order had been made in the year 1844, that the brother of the lunatic, who had for many years acted as committee of her estate, and was represented to have had, for a considerable length of time, a large amount of her property in his hands without rendering any account, should be discharged from his office, and should pass his accounts; and another person had been appointed committee in his place. In the month of July, 1845, and before those accounts had been taken, the lunatic, having made great progress towards recovery, obtained leave from the Lord Chancellor to go and reside in Scotland, the place of her birth, where she was to be free from control as to her person and the selection and appointment of her servants and attendants, security being given by the committee of her person that she should be forthcoming and amenable to the orders of the court when required.

She now presented a petition, supported by strong affidavits of Scotch physicians as to her complete recovery, praying, among other things, that the commission might be superseded without prejudice to the accounts directed by the former order, and which were still pending, and that she might be at liberty to prosecute those accounts by her own solicitor. She also prayed that, in consideration of her advanced age (being seventy-five years old,) her personal attendance, for the purpose of having the commission superseded, might be dispensed with.

1847.—In re Gordon.

Mr. James Parker and Mr. Roundell Palmer, for the [*243]
petitioner.

Mr. Romilly and Mr. Willcock, for the brother.

Mr. Teed and Mr. Dickinson, for the existing committee of the estate.

On the part of the petitioner, it was stated that, notwithstanding the comparative freedom from constraint which she enjoyed under the previous order, the existence of the commission was a cause of pain and irritation to her.

THE LORD CHANCELLOR.—You ask me to supersede the commission, without seeing the party, on the certificate of physicians in Scotland, and without any certificate of physicians in this country. In one case within my own experience the medical men had certified that the party had recovered, and when I came to see him I found it quite otherwise. She is already free from control, and she will have much more chance of effecting a settlement with her brother than if the commission were superseded. For if she thinks she can get rid of the commission as far as regards herself personally, and keep it alive for the purpose of enforcing her rights against others, I think she is under a misapprehension.

There is, however, evidence that she is sufficiently advanced towards recovery to select the persons who shall have the management of her affairs, and I would therefore make an order for that purpose if it be desired. But my impression is, that, while giving her power to appoint a solicitor to attend the investigation *of the accounts, and allowing her every pos- [*244]
sible control over herself and her property, I shall best promote her real interest by not superseding the commission until these matters are settled.

The order was, that the petitioner should be at liberty to attend and act by her own solicitor on the taking of the accounts, inquiries, and proceedings then pending, or to be thenceforth taken or prosecuted in the matter, and upon the taxation of costs ;

 1847.—In re Gordon.

and that no person other than the accounting parties or the parties whose costs should for the time being be under taxation should for the time to come attend on such accounts, inquiries, and proceedings, and taxation of costs, or be served with notice thereof. And after directing in the usual way that the existing committee of the estate should pass his accounts and be discharged, it directed that in lieu of the limited sum of 208*l.* before allowed for the maintenance of the petitioner, the whole income of a sum of 12,000*l.* stock in court should be paid to her, upon her sole receipt: and that the rest of the matters prayed by the petition should stand over.

[*245] *In the Matter of NESBITT, an alleged Lunatic.

1847: Jan. 22.

On a contest for the carriage of a commission of lunacy that party is selected who is most likely to bring out the whole truth; subject to which a preference is given to the nearest of kin.[1]

Applications by other parties for leave to amend the execution of the commission are in the discretion of the court, and mere relations are not generally allowed to do so unless they have an interest.

A suggestion that a party, who applied for such leave on the ground of interest, should, as the condition of its being granted, be concluded by the verdict, overruled.

On a contest for the carriage of a commission of lunacy, in this case, between the mother of the lunatic and his first cousin on his father's side, who was his presumptive heir-at-law, it appeared the mother was a person of very eccentric and secluded habits, not, however, amounting to incapacity for ordinary business: and there was also evidence that the lunatic, who had for the last thirteen years been residing with a medical man at Yarmouth, to whose care he had been committed by his family, had, many years ago, executed settlements of his property in favor of his mother's family.

Mr. *Stuart* and Mr. *Follett*, for the heir-at-law, relied on both

[1] See note 1, ante, p. 12.

1847.—*In re Nesbitt*.

those circumstances as entitling their client to the carriage of the commission, in preference to the mother, and cited *In re Webb*.(a)

Mr. *Tinney* and Mr. *C. Hall*, for the mother, cited *Ex parte Broadhurst*,(b) to show that the next of kin, was entitled to a preference; and contended that the interest which the heir had in setting aside the alleged settlement (under which it was not suggested that the mother took any personal benefit,) was an objection to him rather than a circumstance in his favor.

Mr. *Stuart*, in reply, referred to *In re Whittaker*.(c)

*THE LORD CHANCELLOR said he had no disposition [*246] to depart from the rule laid down by Lord Eldon, which was merely, that *cæteris paribus*, the nearest relations were the proper persons to have the carriage of the commission; but that it was the duty of the holder of the Great Seal to see that that should be done which, under all the circumstances, appeared to be best for the interest of the lunatic. Here it appeared that the mother was a person of eccentric habits, and not likely personally to take an active part in the matter. Then it was stated that certain deeds had been executed by the lunatic, and it was important that the jury should have laid before them any evidence that might exist of the lunacy of the party at the time when those deeds were executed. The mother, indeed, might be induced to bring such evidence forward for the sake of her son; but she might also be indifferent about it; whereas the heir would certainly do so; for he had a personal interest in it. The carriage of the commission ought to be given to the party who was most likely to bring out all the facts.

Mr. *Tinney* then asked that the mother might have leave to attend.

THE LORD CHANCELLOR.—I do not see that she has any interest. If you can show me that she has, I will consider it. But I cannot give her leave merely because she is the mother.

(a) *Ante*, p. 10.

(b) 1 V. & B. 57.

(c) 4 Myl. & Cr. 441.

 1846.—*In re Nesbitt*

Feb. 12.—A petition was afterwards presented by the parties claiming under the settlement, praying that they might be at liberty to attend the execution of the commission, and cross-examine the witnesses at their own expense.

[*247] **Mr. Js. Parker*, for the petition.

Mr. Stuart and *Mr. Follett* proposed it on behalf of the heir, and suggested that, if liberty were given, it should be on the terms of the petitioners' consenting to be bound by the verdict.^(a)

THE LORD CHANCELLOR.—No one would ever consent to be bound on such a question by proceedings in lunacy. The application is in the discretion of the court. The verdict would not be conclusive; but if found against these parties, it would be evidence. It is for the interest of all parties that the truth should be ascertained, and therefore, although it occasions some additional expense, unless the estate be a very poor one, it is desirable that they should have leave to attend.

IN RE SPENCE.

1847: May 7.

The cases in which this court interferes for the protection of infants are not confined to those in which there is property.

The court may make an order for the delivery of an infant to the party who ought to have the custody of it, on petition, as well as under the general jurisdiction upon *habeas corpus*.

A husband, whose wife had three years before absconded with his infant children, applied for an order, that the wife's brother, who had assisted in her escape, and had since transmitted to her the income to which she was entitled under her marriage settlement, of which he was trustee, might either produce the children or disclose the place of their concealment, or, at least, discontinue the transmission of the income. On an affidavit of the brother, that the children were not in his custody or under his control, the order was refused.

(a) See *In re Watts*, 1 Phill. 512.

1847.—In re Spence.

THIS was an appeal from an order made by the Vice-Chancellor of England, on the petition of Mr. Spence, requiring the appellants, who were the two trustees of his marriage settlement, to deliver up to him the custody of his three children.

"The petition on which that order was made, stated [*248] that the petitioner and his wife were married in 1839; that in 1842 he renounced the Protestant faith, which was that of his wife, and became a Roman Catholic; that shortly after having become embarrassed in his circumstances he broke up his establishment at Stockton, where he had lived up to that time, and went to London to arrange his affairs, his wife and children remaining at Stockton with her mother, who also resided there; that, after a short absence, he returned to Stockton in September, 1843, with the intention of taking a lodging for himself and his family, but that, on the day of his arrival there, his wife, who was then pregnant with their third child, secretly escaped with her brother, who was one of the appellants, taking the two children, who were then born, with her, and that she had ever since kept the children in some place of concealment which was known to the appellants, who had from time to time transmitted to her the income to which she was entitled under her marriage settlement, though they refused to inform the petitioner where she was.

The prayer of the petition was, that the children might be delivered up to the petitioner, and that, if necessary, a writ or writs of *habeas corpus* might issue for that purpose.

On the original hearing of that petition before the Vice-Chancellor, an order was made for a writ of *habeas corpus* against the wife and the appellants. The wife, however, was not to be found; and the return to the writ, as against the appellants, was, that they had not, nor ever had, the children, or any of them, in their custody or under their control. On that return being made, the petition was brought on again before the Vice-Chancellor, when, upon an affidavit of service upon the appellants, who did not appear, the order in question was pronounced.

"The appeal petition now came on to be heard upon [*249]

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several additional affidavits, filed since the hearing below by the appellants.

The affidavit of the brother stated, that the cause of his sister's flight with the children was not merely her husband's change of religion, and the apprehension she felt that he would execute a threat which he had frequently made, of taking them from her for the purpose of bringing them up in the doctrines of the Roman Catholic Church, but also the harsh and unfeeling treatment she had received from him ever since their marriage; the recollection of which caused her such uneasiness at the thought of its being renewed by their again cohabiting together, that her medical attendant had declared his opinion that her confinement, which was then shortly expected, would be fatal to her, unless the agitation of her mind could be calmed by her being temporarily removed to some place out of the reach of her husband. That, under the influence of fears for his sister's life, he accompanied her for about ten miles to the railway station at Darlington, from whence she proceeded with the children by railway to Newcastle, and from thence to a place out of the jurisdiction of the court, where, as the deponent believed, she had ever since remained. He added, however, that he did not at the time know what was her destination; but that he fully believed that her object was merely to withdraw until her confinement was over, and then to return to her husband. He admitted, that he had since, from time to time, transmitted to her the income to which she was entitled under the marriage settlement; and said he was ready to reveal the place of her concealment if the court should require it, but that otherwise he declined to do so.

The other appellant denied having had any share in [250] the abduction of the children, or that he knew *where they or their mother were; and both the appellants denied that the children were under their or either of their control.

There were several other affidavits by other parties, which, besides confirming the statements of the brother as to the unfeeling conduct of Mr. Spence towards his wife, imputed to him

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immoral and dissolute habits, and the use of profane and blasphemous language. .

Mr. *J. Parker* and Mr. *Torriano*, for the appellants, contended, first, that the court had no jurisdiction over infants, distinct from that at common law upon *habeas corpus*, unless there was some property to be administered for the infants' benefit; and that a good return having been made to the writ in this case, the petitioner's remedy was exhausted, and the subsequent order on the appellants to produce the children, was an excess of jurisdiction. In support of which objection they referred to *Ex parte Hopkins*,^(a) and *Wright v. Naylor*.^(b)

(a) 3 P. Wms. 152. There seems to be some inaccuracy in what is attributed to Lord King by the report of this case—to the effect, that the court has no jurisdiction to make an adverse order, for the change of the custody of an infant, on petition, without a suit; for, on reference to the Registrar's Book, (Reg. Lib. A. 1732, f. 456,) it appears, that the petition was presented in a suit of *Hopkins v. Hopkins*, which had been instituted by the father of the infants in their names, for an account of their uncle's estate, in which they were interested.

With respect to the other proposition contended for in the argument of the principal case—that the jurisdiction of the court over infants is confined to cases in which there is property to be administered for their benefit, see *Wellesley v. Duke of Beaufort*, 2 Russ. 21, where Lord Eldon says, "If any one will turn his mind attentively to the subject, he must see that this court has not the means of acting except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise its jurisdiction, because the court cannot take on itself the maintenance of all the children in the kingdom. It can exercise the jurisdiction usefully and practically, only where it has the means of doing so, that is to say, by its having the means of applying property for the use and maintenance of the infants."

There are cases, however, where the infant being entitled to property in reversion, but to no present means of its own for maintenance, and the father being unable to maintain it suitably to its expectations, the court has interfered to prevent the father from depriving his child of the benefit of an education with which others may be willing to provide it. *Ex parte Warner*, 4 Br. C. C. 101; *Orby v. Hunter's case*, 2 Cox, 242, Jac. 250, n. [In Cox's report of the latter case it is stated, that the infant was entitled to maintenance under the will of his grandfather; but in Mr. Jacob's note of it, which is correctly extracted from the Registrar's Book, that circumstance does not appear.] In both of these cases, however, there seems to have been some other ground of interference, connected with the conduct and circumstances of the father, besides his poverty. And in a subsequent case before Lord

 (b) 5 Madd. 77.

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[*251] *Mr. Rolt and Mr. Martindale, *contra*, relied on *Eyre v. Countess of Shaftesbury*, (a) *Lady Teynham v. Leonard*; (b) and two unreported cases from the registrar's book, *Ex parte Bishop*, (c) and *Ex parte Wright*; (d) neither of which however, were in point, the first being an order, that a [*252] person who had removed an infant for "whom a guardian had been appointed by the court, should restore the infant to such guardian or stand committed; and the second being an order by consent.

[THE LORD CHANCELLOR.—I have no doubt about the jurisdiction. The cases in which this court interferes on behalf of infants, are not confined to those in which there is property. Courts of law interfere by *habeas* for the protection of the person of *any* body who is suggested to be improperly detained. This court interferes for the protection of infants, *qua* infants by virtue of the prerogative which belongs to the crown as *pater patriæ*, and the exercise of which is delegated to the great seal.[1]

That objection being overruled, the case was discussed upon the merits, it being contended on the part of the respondents that, even if there was not sufficient ground in the affidavits for the order actually made, the court would make *some* order,—either to prevent the brother from continuing the payment to the

Eldon, after observing that there were cases where, without any provision antecedently made, the court would remove a child from the parent—as, where the father professed himself an Atheist; or (under the old penal laws against Roman Catholics) where he was of that religion,—his lordship is reported to have added, "that, wherever the court had interfered against the father upon pecuniary considerations (only,) they had been solid considerations, and not merely expectations, and that in all the cases which he remembered, there had been some immediate irrevocable provision by which the child could be brought up in a manner suitable to its future property, but that the court would not interfere upon a mere offer." Jac. 264, n.

(a) 2 P. Wms. 102.

(b) 4 B. P. C. 302. For Lord Maccolesfield's order, from which this was an appeal, see *Ex parte Barrett Lennard*, Reg. Lib. A. 1723, f. 85.

(c) Macpherson on Infants, Appx. II.

(d) Reg. Lib., 1796, f. 228.

[1] See *The People ex rel Bone v. Mercien*, 8 Paige 47; *United States v. Green*, 3 Mam. R. 483.

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wife, with a view to induce her to return, or else to compel him to disclose where the children were concealed. On the other hand, it was argued, that as the object of the jurisdiction, if it existed at all, was the protection of the infants, the court would not lend its aid for the purpose of restoring them to a father in whose hands there appeared to be so little probability of their being well brought up.

THE LORD CHANCELLOR.—It does not follow, because a husband's conduct is such as to make his wife very unhappy, that he is therefore to be deprived of the custody of his children. To justify such an interference with the father's rights, his *misconduct must appear to be of such a nature as [*253] to be likely to contaminate and corrupt the morals of his children, as in the Wellesley case.(a)[2] I asked when these

(a) 2 Russ. 1, and see *Ball v. Ball*, 2 Sim. 35.

[3] Chancellor Walworth in the case of *The People v. Mercien*, 8 Paige, 47, held, that where the wife is not living in a state of separation from her husband which can be considered as immoral and illegal, the custody of an infant of tender age, will be given to the mother, whenever it appears that the interest of the infant demands it. That where no sufficient reason exists for depriving the mother of the care and nurture of the infant child of very tender years, it would not be a proper exercise of judicial discretion to take the child from the custody of the mother for the purpose of delivering it to the father. He conceded in that case, that if the child was delivered to the father he had no apprehension that it would be treated with unkindness. But as the infant had no property, its guardianship must be a guardianship for nurture merely, and the mother, all other things being equal, was the most proper person to be entrusted with such a charge, in relation to an infant of tender years. The Court for the Correction of Errors, in the case of *Mercien v. The People*, 25 Wend. 64, seem to have recognized the doctrine, that although as a general rule a father is entitled to the custody of his minor children; but when the parents live apart under a voluntary separation, and a father has left an infant child in the custody of its mother, such custody will not be transferred to the father by the process of *habeas corpus*, when the infant is of tender age, and of a delicate and sickly habit, peculiarly requiring a mother's care and attention; and especially will not order such transfer to be made where the qualifications of the father for the proper discharge of the parental office are not equal to those of the mother.

For cases which hold that the law regards the father as the head of the family, and commits to his charge the children in preference to the claims of the mother or any other person, see *The People v. Chegary*, 18 Wend. R. 637; *The People ex rel. Nicholson*, 19 Wend. R. 16; *The King v. De Menville*, 5 East R. 221; *Ex*

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affidavits were opened, whether they amounted to that ; for, if they did not, it was useless to go into them. They were, however, read ; and, having heard them, I am of opinion that they afford no sufficient reason why this court should refuse to restore to this gentleman his children, if it had the means of doing so. But upon the evidence now before me, as it affects the appellants, it is clear that the Vice-Chancellor's order must be discharged.

As to one of those gentlemen, it appears, that he had nothing to do with the abduction of the children, and is unable to give any information respecting them. The other, it is true, accompanied the mother a certain distance on her journey, but he positively denies that he knew where she was going. It is clear, that the children are not in his custody now. Their departure took place in September, 1843. The father, though he knew the circumstances, did not consider at that time that he had any case to make against him. Is there any thing to lead to the inference that he is now in a condition to restore the children ? The mother is probably living abroad ; he, at Stockton. Indirectly, it is said, he has the power of bringing them back, by stopping her income : but the court cannot order him to use those indirect means of doing what he is unable to do directly. As to compelling him to disclose the place of their concealment, he is a mere witness as to that. I could exercise the jurisdiction of the court over him if he had the children in his custody, [*254] but I cannot put it in force against parties to compel them to disclose facts of which they are mere witnesses.

The order of the Vice-Chancellor may have been a proper one upon the facts before him ; but upon the facts now before

parts *Skinner*, J. B. Moore, 278 ; *Ball v. Ball*, 2 Sim. 35 ; *Wellesley v. The Duke of Beaufort*, 2 Russell, R. 9.

For cases which hold that the right of the father may be forfeited by misconduct, or lost by misfortune ; and when he attempts to assert it by *habeas corpus*, the court exercises a discretion, having regard to the welfare of the child, and that it may leave children in the custody of the mother or some other person in preference to the claims of the father, see *The People v. Mercien*, 8 Paige, 47 ; *Matter of M'Dowles*, 8 John. R. 328 ; *Matter of Weldron*, 13 John. R. 418 ; *Matter of Wellstonecraft*, 4 John. Ch. R. 80 ; *Mercien v. The People*, 25 Wend. R. 73.

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me, I am clearly of opinion that the order must be discharged, and the petition dismissed.

In the Matter of MILFIELD, a person of unsound Mind.

And in the matter of 1 W. 4, c. 60.

1847: May 7.

Tenant for life, of estates decreed in a creditors' suit to be sold for payment of debts, is a trustee for the purchaser within the meaning of 1 Wm. 4, c. 60, s. 18.

A DECREE had been made in a creditor's suit, for a sale of the real estates of the debtor, which were devised by his will to his widow for life, with remainder to his son: and the estates had been sold in the Master's office. The widow was alleged to be a lunatic, though not found such by inquisition, and the son had been transported for crime.

Mr. *Goodeve* now applied, upon the petition of the plaintiff in the cause, for an order under the 1 W. 4, c. 60, ss. 18 and 20, for some person, on behalf of the lunatic, to convey the estates to the purchaser under the 1 W. 4, c. 47.

THE LORD CHANCELLOR at first doubted his jurisdiction, on the ground, that there was no express declaration of trust in the decree, and that he had no power in lunacy to declare a trust. But on being referred to **King v. Leach*,^(a) as [*255] showing that a decree for sale was a sufficient implication of such a trust to bring the case within the scope of the act, his Lordship said, that, on the authority of that case he would make the order, though, otherwise, he should have hesitated to do so.

(a) 2 Hare, 57.

1847.—*Ferraby v. Hobson.*

FERRABY v. HOBSON.

1847: June 2.

A bill founded on an imputation of fraud and personal corruption will not warrant an inquiry on that case being disproved, whether there has not been neglect or an omission of duty.

A trustee letting a farm originally at a proper rent, will not be held personally liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him, with propriety as between landlord and tenant, to obtain a higher rent.

And, *semble*, that rule would be applicable, even to a case in which the tenant was a near relation of the trustee, unless there were some other circumstance to confirm the suspicion of personal favor which that relationship is calculated to excite.

THIS was an appeal from part of a decree of Vice-Chancellor Knight Bruce, by which it was ordered amongst other things, that the appellant and his co-trustee under the will of the testator in the cause, should in their accounts be charged with 42*l.* a year more than they had actually received as the rent of a farm, part of the trust estates, during the three years from Lady-day, 1836, to Lady-day, 1839, and by which the appellant was ordered to pay the costs of so much of the suit as related to that matter.

The bill sought to charge the trustees with several other breaches of trust, as to which, however, it was dismissed at the hearing, with costs. The only part of the bill which related to the subject of this appeal was as follows:—

[*256] *In the stating part of the bill, it was alleged, that the trustees had let the farm in question at an inadequate rent to a Mrs. Rawlins the appellant's sister, nominally as their tenant, but really as agent, and for the benefit of the appellant himself, and that he had in fact pastured his cattle upon it. And in a subsequent part of the bill, after suggesting a pretence, "that the farm was let to the sister, and had always been occupied by her at a fair and just rent, and that the appellant had no other motive in letting it to her than that of procuring a good and responsible tenant thereof," it charged, that the contrary was

1847.—*Ferraby v. Hobson*.

the truth, and that the farm had, during the whole period of its occupation by the sister, been held at a rent below its value; and that she was not acquainted with farming, and had not capital to cultivate it; and there were many farmers of credit and experience in the neighborhood who were desirous of occupying it, and that the appellant grazed his own cattle on the farm, and otherwise acted respecting it, as if he were actually tenant of it himself.

At the hearing, the facts appeared to be, that the testator died in 1832, that the tenant who was then in the occupation of the farm, continued to hold it until the year 1835, when he gave it up; and that the trustees, after offering it at a rent of £408, to a person named West, who refused to take it on those terms, let it at that rent to Mrs. Rawlins, who continued to hold it as tenant from year to year at the same rent until Lady-day, 1839, when, in pursuance of a notice given to her by the trustees, on the suggestion of some of the parties interested that the rent was too low, it was raised to £450.

There was a good deal of conflicting evidence as to the adequacy of the rent during that period, and upon "an [*257] intimation from the court, that the point required further investigation, it was agreed between the parties, in order to avoid a reference to the Master, that the question should be referred to a Mr. Kirby, a land surveyor, who certified that £408, was a sufficient rent for the year 1835—6; but that the rent for the three subsequent years ought to have been £450; and upon that certificate the decree in question was made.

The appeal now coming on to be heard,

Mr. Bacon and *Mr. Glasse* appeared for the appellant.

Mr. Russell and *Mr. Leach*, for the respondents.

THE LORD CHANCELLOR, without hearing a reply, said, I am clearly of opinion that this decree charges the trustees far beyond what any rule of this court will justify. The decree directs that they shall be charged for three years with an extra rent for the farm, from Lady-day 1836 to Lady-day 1839, being

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the difference between £408 and £450. Now what are the facts as they appear in evidence? [His lordship shortly recapitulated the facts as above stated, and proceeded to this effect.]—Such, then, being the history of the transaction, what is the case made by the bill upon which the trustees have been charged with this extra rent? The case alleged is, that, ever since the testator's death, the trustee had let the farm to his sister at a low nominal rent, in order that he might himself be the real tenant; and that circuitously, through her intervention, he appropriated to himself the difference between that rent and the actual value of the farm; a case, no doubt, which, if made out, would [*258] have been very disgraceful to him, as "it would have shown an endeavour on his part to enrich himself at the expense of the estate of which he was trustee. That case, however, is entirely negatived by the fact which is now admitted on all hands, that the rent originally reserved on Mrs. Rawlins taking the farm was a fair rent: and the only ground for that part of the decree, which is the subject of appeal, is, that from the certificate of Mr. Kirby, which the parties have agreed to treat as evidence, it appears that, between the expiration of the first year of her occupation and the time when the rent was ultimately raised, £408 was not an adequate rent; in other words that more might have been obtained.

Now, in the first place, I find nothing in the bill which seeks to make the testator responsible under such a state of circumstances. The charge made against him is not a charge of neglect in having permitted a tenant, who originally entered at a fair rent, to continue in possession of the farm at that rent, after a higher might have been obtained: and, without saying what circumstances might or might not have made the trustee liable upon such a case, if it had been made, that case is obviously very different from one in which he is charged with personal corruption, and with appropriating to himself the property of others.^(a) Had he been charged with mere neglect, it might have been shown that, although the land had increased in value, the increase was owing to the outlay of the tenant; and, in that

(a) See *Glascott v. Long*, post, p. 310.

 1847.—*Ferraby v. Hobson*.

case, no man would say it was the duty of the trustee, or even justifiable for him, to exact from the tenant the increase of value derived from his own expenditure: at least, I am sure the effect of such a doctrine would be to make trustees very bad landlords: for unless tenants *from year to year had [259] such confidence in those under whom they hold, as to induce them to spend money in improvements with an assurance of not being disturbed in the enjoyment of the fruits of their outlay, it would be impossible for the land to be cultivated in this country, where so large a portion of it is occupied by tenants without the security of a lease. Whether the facts of the case would or would not have borne out such a defence, is immaterial: it is sufficient to say that, if the charge made against him had been one of mere neglect, his attention would have been directed to it, and he might have shaped his defence accordingly.

It was indeed attempted to be argued, that that charge was included in the case made by the bill: and it is true that there is a charge that the farm had been held by Mrs. Rawlins at a rent below its value; but it is quite clear when you look at the context of that passage, and the suggested pretence to which it is an answer, that it has reference exclusively to the charge of personal corruption contained in the previous part of the bill, and not to any distinct case of mere neglect or omission of duty.

I am of opinion, therefore, that the reference to Mr. Kirby was entirely out of the case; that it was not warranted by the pleadings, and ought not, therefore, to have been made.

But, independently of that, what are the facts appearing upon Mr. Kirby's certificate? Why that, from Lady-day 1835 to Lady-day 1836, all was right; that during that year the tenant in occupation of the farm was paying the full rent for it. But circumstances might alter. Now I will suppose that the circumstances did alter, not in consequence of anything done by the tenant, but of a change in the price of agricultural produce, *which would make it worth a tenant's while to [260] pay a higher rent than that which had been properly reserved in 1835. Still the trustee could not have interfered with the tenant's occupation until October 1836; and then, the ten-

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ancy being a Lady-tenancy, he could only have given a notice to expire at Lady-day 1837. But how it does it appear that, in October 1836, there was sufficient evidence of the increased value of the farm to make it his duty, or even justifiable in him, to put an end to the tenancy which, up to that time, had been a good and proper tenancy? It may be that the increased value of the land was permanent; and it may appear now that more money might have been obtained if notice had been given at an earlier period. But there is nothing to show that the trustee had that knowledge, or that the circumstances were such as to enable him to form a judgment, that it was his duty to raise the rent or determine the tenancy. I cannot think, therefore, that he was guilty of any breach of trust in not giving notice only six months after the change of value, even supposing that change to have been occasioned by a rise in the price of agricultural produce. If there was not, then there was no delay, no neglect of duty, in not giving notice in October 1836; and if he did not give notice to expire in March 1837, he could only give it to expire in March 1838. He did not do it then, but he did in October 1838, for March 1839.

Now I put it to Mr. Russell to refer me to some authority, to show that a trustee, letting a farm at a proper rent, is personally to be charged with the difference between that rent so properly reserved, and the rent which at some future period of the tenancy might have been obtained, because he neglected to give notice to quit, a few months after there appeared to be a probability that the price of agricultural produce would enable [261] him with propriety, as between landlord and tenant, to obtain a higher rent. No such authority has been found, and there is no ground upon the facts before me, for any such decision. I do not speak of a case of great neglect,—certainly not of a case in which the omission to give notice can be referred to any favor shown to the tenant. But though it is not necessary that there should be actual fraud, yet the neglect must be so gross as to amount to something like fraud before a trustee can be charged with such omission as a breach of trust.(a)[1]

(a) See *Dee v. Radcliffe, East*, 278.

[1] See *Diffenderfer v. Winder* 3 Gill & J. 311; *Thompson v. Brown*, 4 John, Ch.

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In this case the notice might have been given a year earlier,—possibly two years; certainly not more; and strictly speaking, I apprehend it could not be carried further than one year, before the notice was actually given; and upon that fact alone I am called upon by the respondents to act, without any knowledge of what it was that gave rise to this improved value, whether it was owing to the expenditure of the tenant, or to a rise in the price of agricultural produce; and that, too, in a suit in which that species of misconduct is not even alleged.

I am quite clear that there is a miscarriage in this part of the decree, and that all that part of the bill, which sought to make the defendant personally liable in respect of his dealing with his farm, ought to have been dismissed with costs.

I cannot, however, part with the case without observing (though in this case it happens that the facts which appear in evidence completely remove all suspicion) that trustees expose themselves to great peril in allowing their own relatives to intervene in any matter connected with the execution of the trust; for the suspicion which that circumstance is calculated to excite, where there is any other fact to confirm it, is one which it would require a very strong case to remove.

***The Earl of PORTARLINGTON v. DAMER and others. [*262]**

LEWIS v. DAMER and others.

1847: June, 4.

A party prosecuting a suit after notice of a decree in another suit, under which he may obtain all the relief which he seeks in his own, may be refused his costs of an application to stay proceedings: but it is contrary to the practice, to order him to pay such costs.

Such application may be made by the plaintiff in the suit in which the decree has been made, if he have an interest in staying the proceedings, as well as by the defendant, although such plaintiff be not a party to the other suit.

R. 629; Smith v. Smith, 4 John. Ch. R. 489; Hester v. Hester, Dev. Eq. 326. Ringgold v. Ringgold, 1 Har. & Gill, 11; Osgood v. Franklin 2 John. Ch. R. 1; S. C., 14 J. R. 387.

1847.—The Earl of Portarlington v. Damer.

THE first of these suits was instituted by the residuary devisee and legatee under the will of the late Lord Portarlington, against the executors and trustees, and several annuitants, and other parties interested under the will, praying for the execution of the trusts thereof. The second suit was a creditor's suit, by a judgment creditor, against the executors and trustees only, praying payment of the debts "according to the trusts of the will; the testator having, by his will, devised one of his estates in particular to be sold for that purpose.

On the 1st of April, a decree was made in the first suit, declaring that the trusts of the will ought to be carried into execution; and directing the usual inquiries as to debts, personal estate, real estate, and incumbrances. Notice was immediately given of that decree by the plaintiff in the first suit to the plaintiff in the second, with an offer of payment of the costs of the latter suit up to that time, and an intimation that, if proceedings therein were not stayed, an application for the purpose would be made to the court, of which the plaintiff in the second suit would have to pay the costs. That notice, however, was disregarded, and, the plaintiff in the second suit having set his cause down for hearing on the 1st of May, the plaintiff in the first suit moved, before the Vice-Chancellor of England, [*263] "to stay the proceedings, and that the plaintiff in the second suit might pay the costs of the application.

On that motion the Vice-Chancellor made an order, that the proceedings in the second suit should be stayed, and that the costs of all parties who had appeared on the application should be taxed and paid by Lewis; with a declaration that Lewis was entitled to the costs of the second suit up to the time of service of notice of the decree; and, "it appearing that there were at present no assets applicable to the payment," it was ordered that Lewis, or any person interested, be at liberty to apply respecting such costs, as and when there might be assets properly applicable for that purpose, as he or they might be advised.

This was a motion by way of appeal on behalf of Lewis, to discharge or vary that order.

Mr. K. Parker and Mr. Holt, for the motion.

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The order is erroneous in staying the proceedings: for the decree only provides for the execution of the trusts of the will; whereas Lewis, as a judgment creditor, is entitled to payment out of any of the estates that he chooses to select, without regard to the directions of the will: *Budgen v. Sage*.(a)

[THE LORD CHANCELLOR.—He has himself limited his claim to relief: for the prayer of his bill is not for payment generally, but that, in case the personal estate should be insufficient, the deficiency may be raised by sale or mortgage of the real estate, pursuant to the trusts of the will. And the inquiries already directed *as to debts, real and personal estate, and [*264] incumbrances, would be equally necessary in the second suit, before the court could order payment at all. But the objection that occurs to me is this: Lord Portarlington was not the party to make the motion, not being himself a party to the second suit; but Damer, who was the plaintiff in that suit, ought to have made it. What could the incumbrancers have to do with the motion? They might be benefited if it succeeded: but they could have nothing to say against it: therefore it was not necessary to serve them; and yet Lewis is ordered to pay their costs. Is there any case in which a suit has been stayed at the instance of the party who is a stranger to it?

Mr. *Stuart*, in support of the order, having cited *Clarke v. Ormonde*.(b) and *Dyer v. Kearsley*.(c)

THE LORD CHANCELLOR said he was satisfied on that point, but asked whether there was any case in which a party, properly prosecuting a suit, had, on an application to stay proceedings, been ordered to pay costs.

Mr. *Stuart* referred to *Curre v. Bowyer*.(d) *Pott v. Gallini*.(e) *Anon.*(f) *Jackson v. Leaf*.(g) in which a party under such circumstances had been refused his costs of the application to stay

(a) 3 Myl. & Cr. 663. (b) Jac. 546. (c) 2 Mer. 482. n. (d) 3 Madd. 456.
(e) 1 S. & St. 206. (f) 2 S. & St. 434. (g) 1 J. & W. 229.

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proceedings. But he admitted, that he knew of no case in which the party against whom such an application was made had been ordered to pay costs, though, he submitted, that it would be a wholesome practice, where it was clear that both the suits ought not to go on together.

[*265] **THE LORD CHANCELLOR.**—It is very right that there should not be two suits going on together, where the objects common to both may be attained in one: but it is a different thing to say that a plaintiff, going on after notice of a decree in another suit is so far wrong, that the court is to make him pay costs. The court has gone to the extent of saying, that if he goes on he shall not have his costs; but the mere fact of his going on after notice has never yet been punished by making him pay the costs; and I am not inclined to make such a precedent.

I should be the less inclined to make it in this case, because, though it appears that there is authority for the practice of making the application by the plaintiff in the other cause, the effect of it in this case has been to bring all the other parties in that suit before the court: whereas, if the application had been made by Damer, there would have been no necessity for serving any of those parties. Therefore, even if I had found the practice as to costs different from what it is, I should have thought it right to protect the party against the costs unnecessarily occasioned in this case by that course of proceeding.

As to the propriety of staying the proceedings, the only question is, whether the decree which has been obtained, is one which will give him all that he asks in his own suit. Here, it is only said, that the decree embraces something more, and that its complexity may create delay. But that objection has never been allowed. If it were, it would in a majority of cases repeal the rule. The order, therefore, will stand, except so far as it directs Lewis to pay the costs of the application.

[*266] **Mr. Rolt**, for an annuitant under the will, who had been served with notice of the motion below, asked for his costs, the provision made for them by the Vice-Chancellor's order being

 1847.—The Earl of Portarlington v. Damer.

now struck out. And, Mr. Stuart not objecting, it was ordered that all the costs which the Vice-Chancellor had ordered to be paid by Lewis should be costs in the cause of *Lord Portarlington v. Damer*.

 DALE v. HAMILTON.

1847: June 11, 23, 26.

A. and B. for whom land had been purchased by C. with a view to its being resold in building lots, on the land being conveyed to them, signed a paper writing purporting to be a memorandum of an agreement between them relative to the land, by which it was agreed "that they should each advance half the purchase money and receive interest on the same at five per cent., and that they were to have each one-third interest in the purchase and to reserve one third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the land in lots, or any other services that might be required of him; but that it was clearly and distinctly understood that C. should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for." The land having afterwards greatly increased in value, A. and B. refused to recognize C.'s interest in the speculation, and offered him a money compensation for his services. Whereupon C., who had objected, from the first, to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land. And the court, being of opinion that the defendants, by repudiating the trust as to C.'s share, had devolved upon the court the discretion which they had by the memorandum reserved exclusively to themselves as to the time of sale, declared C. entitled to one-third, and referred it to the Master to inquire whether it would be for the benefit of all parties that the land should be sold.

ON the 16th of October, 1843, certain pieces of land, which had been purchased by the plaintiff, who was a surveyor and land agent, then residing at Birkenhead in the county of Chester, for Robert M'Adam, a merchant in Liverpool, were conveyed to M'Adam and the defendant Hamilton and their heirs, as tenants in common. Shortly after which the following memorandum was made and signed by those two parties:—

"Memorandum of an agreement between Robert [*267]
M'Adam and Robert Hamilton, made the 27th of Octo-

1847.—Dale v. Hamilton.

ber, 1843, relative to a lot of land in Prices Street, Lord Street, and Camden Street, Birkenhead, say,

	£	s.	d.
"25,400 square yards, purchased from Thomas Forsyth and his trustees at 4s. 9d. per square yard, - - - - -	6044	7	6
"480 square yards purchased from J. Nillier, at 8s. 6d. per square yard, - - - - -	204	0	0
	<hr/>		
	£6248	7	6

"That the said Robert M'Adam and R. Hamilton shall advance each one half of the purchase money, and that they shall receive interest on the same at the rate of 5 per cent. per annum, which interest is to be made up half-yearly, and calculated the same as banker's accounts: that the said R. M'Adam and R. Hamilton are to have each one third interest in the said purchase, and that they are to reserve one-third of the profits arising therefrom for T. A. Dale in lieu of his commission for purchasing, selling, surveying, valuing, laying out in lots, or any other services that may be required of him; but it is clearly and distinctly understood that said T. A. Dale shall have no power or authority whatsoever over the said land, and that he shall not be entitled to receive any compensation whatsoever therefrom until the whole is sold and paid for, and all outlay and expenses incurred thereon are deducted therefrom.

"R. M'ADAM,

"R. HAMILTON.

"*Liverpool, 27th October, 1843.*"

In the month of December, 1844, and before any part of [268] the land was resold, M'Adam died, having, by his will, devised and bequeathed all his real and personal estate to six persons, and appointed two others his executors. After his death, the land having greatly increased in value, his devisees and Hamilton refused to recognize the plaintiff's interest in it, and were proceeding to make a partition of it between them; whereupon the plaintiff filed this bill, stating that in

1847.—Dale v. Hamilton.

and previously to the year 1843, he had acquired great knowledge and experience in the management of purchases and sales of land, and that early in that year a proposal was made to him by Robert M'Adam, that they should enter into a joint speculation for the purchase of land at Birkenhead, with a view to its being re-sold in lots for building, M'Adam furnishing the capital and the plaintiff the skill and labor, first in making the purchases, and afterwards in laying out and preparing the land for sale and effecting the re-sales: the conveyances of the land, when purchased, to be taken in the name of M'Adam alone, and the profit and loss to be divided in the proportions of one third to the plaintiff and two-thirds to M'Adam, who was to be paid back his advances with interest at 4 per cent. out of the proceeds of the re-sales, before any division of profits was made. That the plaintiff, having acceded to the proposal, purchased the lands in question on the faith of that agreement. But that M'Adam having, before the purchases were completed, assigned one half of his interest in the speculation to the defendant Hamilton, the conveyances were made to M'Adam and Hamilton jointly, as above stated. The bill set forth several letters written by the plaintiff to M'Adam, after the purchase, reminding him of the terms of the agreement between them, and requesting him to sign a written memorandum thereof, which he neglected to do. The bill, however, stated that the memorandum of the 27th of October, 1843, was shortly after its execution shown "by M'Adam to the plaintiff, who thereupon ob- [*269] jected to the clause which excluded him from any authority or control over the land, as being inconsistent with the terms of the agreement between them. And he insisted by his bill that the effect of the memorandum, as a declaration of trust in his favor, ought not to be prejudiced by that clause; but that, if the court should be of opinion that no effect could be given to his right otherwise than subject to such clause, he was willing to be bound by it. The bill prayed that the land might be sold, and the joint speculation wound up and adjusted; and that the monies to arise from the sale might be applied and distributed in conformity with the terms of the agreement, the plaintiff offering to render all such services in and about and preparatory

1847 — *Dale v. Hamilton*.

to the sale, as he had agreed to do; and that the defendants, Hamilton and the devisees of M'Adam, might be restrained from proceeding to a partition.

The letters referred to in the bill were produced from the custody of the defendants the executors, and also the draft of a memorandum of the terms of the agreement as now insisted upon, which had been inclosed in one of the letters for M'Adam's signature.

The defendant Hamilton, in his answer, admitted that, upon the assignment to him by M'Adam of a moiety of his interest, the latter had stated to him that he had agreed to give the plaintiff, by way of remuneration and in lieu of all commission and other recompense, a clear third part of the profit which should be ultimately realized, charging 5 per cent. interest on the outlay, to be calculated half-yearly as on banker's accounts, such remuneration to depend entirely upon and to be payable only out of such ultimate profit. The other defendants, [270] "who were strangers to all that had passed previously to M'Adam's death, ignored all the material statements of the bill, except as appeared from the letters and other documents in their possession; and both they and Hamilton insisted on the Statute of Frauds in bar of the plaintiff's remedy under the alleged agreement, and claimed to be entitled to hold and retain the land in question for their own use and benefit, to the absolute exclusion of the plaintiff from all share and interest therein.

With respect to the memorandum of the 27th of October, 1843, the defendants, the devisees, submitted that it was not a declaration of trust in favor of the plaintiff, but merely an agreement between M'Adam and Hamilton, liable at any time to be revoked or altered by them or their representatives; while the defendant Hamilton stated that, conceiving himself bound by the terms of that document, he had intended strictly to fulfil them if the plaintiff would have performed the services stipulated on his part instead of seeking to prejudice the speculation by a forced and hasty sale. But all the defendants insisted that the plaintiff had, by removing his residence from Birkenhead to Cheltenham, incapacitated himself for the due performance of

1847.—*Dale v. Hamilton.*

those services, adding that they had offered him £1000 for the services he had already rendered, and that they were willing to pay him a just and reasonable compensation for such as he might still perform.

At the hearing of the cause, before Vice-Chancellor Wigram, his Honor, entertaining (as it would appear from the report of his judgment,)(a) some doubt whether he could give plaintiff as effectual relief upon the memorandum of October, 1843, considered as a "recognition of a pre-existing right in [271] the plaintiff, as he could under the alleged agreement, if established; but being of opinion, after an elaborate review of the authorities, that the agreement was of such a nature as not to be within the Statute of Frauds, directed two issues. First, whether, before the 16th of October, 1843, it was agreed between the plaintiff and M'Adam that they should be jointly concerned in the speculation for buying, improving for sale, and selling land at Birkenhead. Secondly, whether, if any such agreement was made, it was a term in it that the plaintiff should have no power or authority in determining when the land purchased in pursuance of the agreement should be resold.

From that order there was an appeal and a cross-appeal; the defendant insisting that the bill ought to have been dismissed; the plaintiff, that an immediate decree ought to have been made in their favor.

At the hearing of the appeals,

Mr. Romilly and *Mr. Roundell Palmer* appeared for the plaintiffs.

Mr. Rolt and *Mr. Bagshawe* for Hamilton.

Mr. Wood and *Mr. Fleming* for the other defendants.

The argument turned chiefly on the question so much discussed in the judgment of the Vice-Chancellor; the defendant's contending that, so far as the case rested on agreement, the re-

(a) 5 Hare, 369.

1847.—*Dale v. Hamilton*.

medy was barred by the statute of frauds: independently of which, they argued that the agreement was in its nature one which, for want of mutuality, this court would not enforce, as it had no power to compel the plaintiff to perform the [272] services which he had agreed to render. They further argued that, the memorandum of the 27th of October, if available at all to the plaintiff (which, for the reason suggested by the answer, they submitted it was not,) he was bound to take the whole of it together, and to abide by the provision which excluded him from all control in the management, the effect of which would be, that, as his right would not arise until the defendants thought fit to sell, he had no present title to sue, because there was no present relief which the court could give him.

The counsel for the plaintiff, on the other hand, contended that the court would put a reasonable construction upon the memorandum, and, if it saw in that document a clear intention to give the plaintiff an interest in the profits of the speculation, would not allow the defendants to make that interest merely illusory by capriciously postponing a sale after the time when it would be for the benefit of all parties that a sale should take place. They also argued the case upon the agreement independently of the memorandum; but upon an intimation from the court that there was not enough without the memorandum to warrant the court in establishing the agreement without an issue, Mr. Romilly, in his reply, said that, rather than incur the expense of an issue, his client would prefer taking such relief as the court could give him upon the memorandum as a declaration of trust; and upon that footing he asked an immediate declaration of the plaintiff's right, and a reference to the Master to inquire whether it would be for the benefit of all the parties that all or any part of the land should now be sold.

June 26.—THE LORD CHANCELLOR.—This case became embarrassed in the court below by an attempt, on the part [273] of the plaintiff, to get what appeared to be more beneficial than what I think he is clearly entitled to, and the obtaining of which was attended with a certain degree of diffi-

1847.—*Dale v. Hamilton.*

culty from the want of an agreement in writing at the commencement of the plaintiff's connection with Mr. M'Adam. The court directed issues to try the fact of partnership, which, if they were to be tried, might, I think, leave the parties in further embarrassment and without the means of coming to a conclusion as to their respective rights.

I need not, however, advert any further to that part of the case; because the court below not having made any declaration in favor of the plaintiff, but having merely directed an issue for the purpose of ascertaining the right, the plaintiff is not satisfied with that decree, and has presented a petition of appeal, which came on for hearing together with an appeal on the part of the defendant, in which it was contended that there was no case made, and that the bill, of course, ought to have been dismissed. The plaintiff, therefore, by appealing, and by what is stated by his counsel at the bar, is now willing to take such relief as I may consider him entitled to, founded on the memorandum of the 27th of October, 1843; and I cannot but think that if the case had rested on that memorandum in the court below, all that embarrassment which was felt in disposing of the case would have been entirely saved; because the case, upon that memorandum, appears to me to be a perfectly plain and straightforward one.

The memorandum is a document signed by M'Adam and Hamilton; and the plaintiff's case is that he entered into an arrangement with M'Adam, the object of which was to purchase land at Birkenhead, not for the purpose of investment or of being retained as real estate, but for the purpose of being resold; and then they were "to divide the profits, the [*274] plaintiff being, as he says, entitled to one-third.

Letters are found from the plaintiff to M'Adam, who is now dead, undoubtedly showing that that was his view of the case; but those letters are no evidence of what they contain, not being recognized by the person to whom they were addressed, beyond this, that such letters were written, and such demands and claims made on the part of the plaintiff. Great difficulty, therefore, arises in establishing the plaintiff's claim on those letters or on the transactions which took place anterior to the date of the

1847.—Dale v. Hamilton.

memorandum of the 27th October, 1843; but that memorandum coming out of the possession of the plaintiff, and signed by M'Adam and by Hamilton (M'Adam having entered into an arrangement with Hamilton to divide with him his interest in the adventure,) is in these words. [His Lordship read the memorandum.]

Now without going out of that memorandum, without, on the part of the plaintiff, claiming any thing except what is to be found in the terms of that memorandum, this is perfectly clear, that there was a purchase made by M'Adam, afterwards divided between him and Hamilton, and that he and Hamilton were only to have one-third each in the adventure; that the adventure, to sell the land and realize the profits after paying the expenses and the interest on the purchase money, and to divide the profits into thirds, one-third for M'Adam, one-third for Hamilton, and one-third for Dale. That we have under the handwriting of Robert M'Adam and Robert Hamilton; and on the part of the defendants, it is asked in the face of that declaration of trust, that, by dismissing the bill, I should tell the plaintiff and tell the defendants too, that they, the defendants, having declared that they are interested [*275] in one-third each, are "to keep the whole, and, that although they have declared that Dale is entitled to one-third, he is not to receive any thing at the hands of a court of equity; and *that*, upon a supposed application of the statute of frauds, a statute made to prevent fraud, and which, therefore, has provided that declarations of trust shall always, not originate in, but be evidenced by writing. For there is this distinction between agreements and declarations of trust: in the one, it is the agreement itself, which is the origin of the interest, that must be in writing; in the case of a declaration of trust, which is only the recognition of a pre-existing interest, it is the evidence and recognition, and not the origin of the transaction, that must be in writing. Here the declaration recognizes a past transaction, because the purchase had been agreed for before Hamilton became entitled to any share in it; and in this agreement between M'Adam and Hamilton they recognize Dale's right to have one-third part of the profit to be produced by the sale of the land after paying the expenses and interest on the purchase money.

1847.—Dale v. Hamilton.

Now it would be the strangest thing in the world, if the statute being satisfied, which, it is, by finding this writing signed by the parties, the court should not give relief to the party whom that document declares entitled to it.

It is nothing that the plaintiff is no party to this declaration of trust; that is not required. A declaration of trust may acknowledge a right in another party, if it is signed by the party declaring that he is a trustee for the other.

The right of the plaintiff, then, under that document, to a third share in the profits of this land being clear, the conduct of the defendants removes the few topics that have been urged against the plaintiff's right; for if they by "their [*276] conduct repudiate the trust and endeavor to exclude him from that which they have themselves under their hands declared him to be entitled to, how are they to argue that he has withdrawn and has not acted under the trust? If the refusal had been on his side; if they, acknowledging his title, had called on him to render those services which seem to have been part of the consideration for letting him in to a share of the profits of this adventure, there might have been a difficulty in the case so presented. But when they insist that he has no right, and endeavor to exclude him, and tell him he has nothing to do with the land, there is an end of the case against the plaintiff for not having performed those services which, by their conduct, they have shown they would have refused to accept, if he had offered to discharge them.

The question, then, is—resting the plaintiff's title on this declaration of trust—what the court ought to do. It is clear that the parties contemplated a degree of management for the purpose of realizing the best profits they could from this adventure. The land was to be allotted and laid out, and various courses adopted for the purpose of obtaining a better sale; and the defendants insist that, by the terms of the declaration of trust, they are to be the sole judges of what that management is to be, and that the plaintiff was to have no voice in it. But the answer to that is, that if the defendants who are trustees, and who have declared themselves trustees, *quoad* the plaintiff's third—if they have themselves refused to perform the trust—if they, by endea-

 1847.—Dale v. Hamilton.

voring to appropriate the plaintiff's share to themselves and to withdraw it from the plaintiff, who is entitled to it, have refused to do that which, by the declaration of trust, they were to have done,—why it is like all other cases of trustees who re-
 [*277] fuse to execute the duty they have *undertaken, and this court will take on itself, as far as it can, to put the *cestui que* trust in the situation in which he would have been if the trusts had been properly performed.

Now all that the court can do is this,—unless the parties will have sense enough, after what has taken place, to arrange among themselves some plan more for their benefit, and they must do that out of court, I cannot interfere with that, though in the meantime I must assume that the plaintiff is compelled to apply to the court for that which the court alone can give him—I must make the decree in the terms Mr. Romilly has suggested; I must direct the land to be sold. It may be better for the parties not to sell the land immediately. If so, and they have any sense of their own interest, they will of course agree among themselves how to manage it. If not, I can only declare the plaintiff's right under this memorandum, and refer it to the Master to inquire whether it is for the interest of the parties concerned that the land should now be sold. If it is to be sold under the direction of the court, there will be no difficulty in disposing of the purchase money produced by the sale.

 [*278]

*JONES v. FAWCETT.

1847: June, 19.

An application by a married woman, plaintiff, for leave to change her next friend, is in the discretion of the court, and will not be granted if there be reason to believe that the defendant's security for costs will be thereby prejudiced.

Whether the court will stay proceedings in a suit by a married woman on the ground that her next friend is not of ability to answer costs. *Quære.*

THIS was a motion to discharge an order made by Vice-Chancellor Knight Bruce, upon the application of the plaintiff, who was a married woman, giving her leave, on the usual con-

1847.—*Jones v. Fawcett*.

ditions as to costs already incurred, to substitute for her existing next friend, with whose solvency the defendants were satisfied, another person as next friend, who, though possessed of some property, appeared from the affidavits to have absconded under circumstances which warranted a strong suspicion that he was insolvent.

It appeared that a previous order had been made, that the plaintiff's solicitor should indemnify the existing next friend against past costs, on the ground that he had led the next friend to believe that in undertaking the office he would incur no liability.

Mr. *Teed* and Mr. *Collins*, for the appeal motion, said that the Vice-Chancellor's order was made on the principle supposed to be established by *Dowden v. Hook*,^(a) that a married woman had a right to select whom she chose as her next friend without reference to his solvency.

THE LORD CHANCELLOR.—It does not seem to me that that case establishes any such general proposition. The question there was, *whether the court should stay pro- [*279] ceedings merely because the next friend was not of substance sufficient to pay costs. Here the question is, whether, there being actually a substantial next friend, the court will allow an insolvent to be substituted in his place. The court will exercise its discretion in granting or refusing such a motion as that.

Mr. *Bell*, in support of the order, relied on the reasoning of the Master of the Rolls in *Dowden v. Hook*, which he observed, went beyond the point decided in the case, the argument of his lordship being, that if a married woman could never institute a suit unless she could find a next friend of ability to answer the costs, the doors of the court would often be closed against the most just claims. It was true that the form in which the question was presented in the present case was different from that in

(a) 6 Beav. 393.

1847.—*Jones v. Fawcett*.

Dowden v. Hook, inasmuch as the application came from the plaintiff instead of the defendant; but in the result it would come to the same thing; for, as the court had already treated the existing next friend as having been improperly induced to undertake the office, the consequence of discharging this order would be that he would refuse to act any longer, and then the question would arise, whether the suit was to be stopped altogether, because the plaintiff was unable to procure any other next friend than the one now proposed.

THE LORD CHANCELLOR, without hearing a reply, said:—

Whether a party who is sued by a married woman has a [*280] right to object to the next friend on the ground *that he is not of substance to answer costs, appears to be the subject of a difference of opinion in different branches of the court, and it is therefore satisfactory to me to be able to dispose of this case without interfering with that question.[1] It is said that, according to the decision of the present Master of the Rolls, which is the last decision on the subject, you cannot inquire into the solvency of a next friend to a married woman;[2] but in that case, and in all those to which he there refers, it was the defendants who complained that the next friend was not of substance to pay costs; whereas here there being a suit in course of prosecution by a next friend, who is admitted to be competent to answer costs, the plaintiff, who can only make an application by her next friend, asks me to dismiss the existing next friend, from the future prosecution of the suit, and to substitute another in his place, without regard to whether the defendant's security will or will not be prejudiced by the change.

It is obvious that if the doctrine contended for were correct, such an application would be of course, not requiring any notice

[1] In divorce cases in N. Y., the 163d rule of the Court of Chancery provides, "no bill shall be filed in the name of a *feme covert* to obtain a decree for a separation or limited divorce, unless the suit is prosecuted by some responsible person, as the next friend of the complainant, who, shall be responsible for such costs as may be awarded by the court. See *Wood v. Wood*, 2 Paige, 454. This rule relates to suits between husband and wife.

[2] See *Davenport v. Davenport*, 1 Sim. & Sta. 101; *Watts v. Campbell*, 12 Vesey, 493; *Pennington v. Alvin*, 1 Sim. & Sta. 264.

1847.—*Jones v. Fawcett*.

on the opposite party; but that is not the practice of the court. The court requires that the defendant should, on such an application, be brought before it: for what reason but because he has an interest in the solvency of the party who is proposed to be substituted? That consideration alone is sufficient to dispose of the present case; for if the substitution of a next friend were a matter of right, the application would not have been made in the way it has been. The defendant, it is clear, is entitled to be heard; and if he can make out that he will be prejudiced by the change, the court will attend to his interest and will not allow the substitution without seeing that he is secured against the consequences. [281]

The question, therefore, is, whether the defendant has shown reasonable grounds for thinking that his security for costs will be endangered by the proposed substitution. And I have no hesitation in saying, that if the choice be between these two persons, putting myself in the place of the defendant, I should, upon the evidence before me, have no difficulty in making the election. Whether the existing next friend has been well treated or not, is a question which I have, on this motion, nothing to do with. As long as he remains on the record, the defendant has a right to look to him. The order below must be discharged.

IN RE FOXHALL.

1847: July 2.

The court may appoint a new trustee on petition, under 1 W. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees.

MR. RIDDELL applied for a reference under the 1 W. 4, c. 60, s. 22, with a view to the appointment of a new trustee of a deed in the place of one of three, who was alleged to be a lunatic, though not found such by inquisition. The other two trustees were living, and there was a power in the deed to appoint new

 1847.—*In re Foxhall*.

trustees: but it was a power to the three trustees therein named, or the survivor of them. He cited *In re Fawciteroy*.^(a)

[*282] *THE LORD CHANCELLOR.—The Vice-Chancellor in that case construed a power that could not be exercised as no power. I think that is right—take the order.

IN RE CLARKE, a Lunatic.

1847: July 2.

The modern practice of making allowances out of lunatics' estates for their collateral relations, disapproved and to be kept within narrow limits.

A comparatively small sum, which the Master had approved as proper to be allowed out of the surplus income of the lunatic, which was very considerable, for drainage of an estate of which the lunatic was tenant for life, with remainder to his brother, was disallowed by the Lord Chancellor, though no one objected to it.

THE lunatic, who was forty years old and unmarried, had a net income of £2760, of which £1000 was derived from real estates of a gross rental of £2039 which were settled by the maternal grandfather's will, subject to certain annual charges, on the lunatic for life, and, failing his issue, on his next brother for life, with remainder to the brother's issue. The lunatic had a father and mother, two brothers and a sister living. Both the brothers were married and had increasing families with incomes of about £230 each. The father had been lately compelled by age and infirmity to resign a lucrative office which he had held for many years, and was in comparatively reduced circumstances.

Under these circumstances an order was made in 1844 by Lord Lyndhurst, for the allowance of £1270 for the maintenance of the lunatic, of which, however, only £470 was to be actually applied to his personal support, the nature of his malady being such that no greater allowance could contribute to his comfort. Of the remainder, £350 was for the father, £350 for the next brother, and £100 for the youngest brother.

(a) 10 Sim. 252.

1847.—In re Clarke.

In the following year the father died, and a petition was then presented, praying that, as the brothers were "de- [*283] prived by his death of occasional pecuniary assistance which he had been able to afford them, and their sister, who had lived with her father, was now dependant entirely on her own resources, which consisted of an income of about £230 a year, the £350 which had before been allowed for the father, might continue to be allowed, and be apportioned among the brothers and sister. A reference was made on that petition, as to the propriety of continuing the allowance of the same amount as before, and the Master reported in the affirmative, apportioning the £350 as follows: £150 to the elder brother: £100 to the younger one; and £100 to the sister.

Mr. *R. Palmer* now appeared in support of the petition of the committee, to confirm the report.

Mr. *Shapter* for other parties.

THE LORD CHANCELLOR.—I make the order because the Master has acted on the authority of a distinct order of the court, the limits of which he has not exceeded. But this case is not to be drawn into a precedent; for I think this liberality out of the lunatic's estate to *collateral* relations, whom he is under no obligation to support, has been carried much too far. I remember Lord Eldon being very reluctant to allow it to any extent. The practice has been greatly extended since his time, and I wish it to be understood, that on another occasion I shall not carry it so far as it has been carried in this instance.

The same report also certified the Master's approval of the expenditure of £148 for drainage of part of "the [*284] real estate, and £360 for permanent repairs, and of the payment of both sums out of a fund in hand arising from the accumulation of income.

THE LORD CHANCELLOR.—I cannot confirm that, at all events. If the remainderman had been the son of the lunatic, there might

1847.—In re Clarke.

have been some ground for it: but I cannot sanction payment out of the lunatic's property for drainage and repairs which are to benefit his brother. Why should not the £148 be advanced under the drainage act?

Mr. *Palmer* said, the reason was, that the sum was so small.

THE LORD CHANCELLOR.—I cannot do injustice because the sum is not so large. You may take an order allowing it to be advanced under the drainage act.

IN THE MATTER OF WORCESTER CHARITIES.

1847: July 2.

The court will not make an order for filling up vacancies in charity trustees, under the Municipal Corporation Act, unless it be satisfied that the existing number is practically insufficient, and that inconvenience arises from not having more.

PETITION for the appointment of new trustees, under the Municipal Corporation Act, of charities formerly vested in the corporation of Worcester, three out of fifteen who were originally appointed being dead, and two others incapacitated from acting.

[*285] *Mr. *Blunt*, for the petition, stated that the existing trustees did not oppose the application.

THE LORD CHANCELLOR.—Ten are surely enough. Unless you can satisfy me on affidavit that ten is not a sufficient number and that inconvenience arises from not having more, I shall not make the order. It was not intended that the whole number originally appointed should be always kept up.

1847.—Dresser v. Morton.

DRESSER v. MORTON.

1847: July 3.

The notice required by the 88th Order of May, 1845, does not apply to proceedings for appointing a receiver, but only to his taking possession of the estates when appointed.

MR. TREED moved on behalf of the defendant that an order, that the receiver appointed under the decree (which had been taken *pro confesso*) might be at liberty to take possession of the estates in question in the cause, might be discharged, on the ground that the appointment of the receiver was obtained without any other notice of the proceedings in the Master's office than the usual warrants, which, it was contended, was a contravention of the 88th Order of May, 1845, which provides "that *no proceedings is to be taken*, and no receiver appointed under the decree is to take possession of the estates of the defendant, and no other process is to issue to compel performance of the decree without leave of the court, which is to be obtained on *motion with notice*."

Mr. Walker and Mr. Anderson appeared for the plaintiff; but

"THE LORD CHANCELLOR (without hearing them) [*286] said:—The order is not, that no proceeding shall be taken to appoint a receiver, but that no receiver appointed shall take possession. It assumes that the receiver may be appointed under the decree. If not, why provide that he shall not take possession without notice? That is almost equivalent to an enactment that he may be appointed without notice.

Motion refused with costs.

1847: July 17.

The meaning of the common affidavit required on applications for leave to sue or defend *in forma pauperis* is, that the party has not 5*l.* in the world besides, &c., available for the prosecution or defense of the suit; and if he can make the affidavit with truth in that sense, the omission to set forth the details of his means and the circumstances which render them unavailable, is not such an omission of material facts as will induce the court on that ground alone to discharge the order.

 1847.—*Dresser v. Morton*.

THE object of the suit was to foreclose an equitable mortgage for securing a debt due from the defendant to a joint stock bank, of which the plaintiff was the suing officer.

After the decree, the defendant obtained an *ex parte* order at the rolls, upon the common affidavit, for leave to defend the suit *in forma pauperis*. But that order was afterwards discharged by the Master of the Rolls, upon an affidavit stating that the defendant was entitled to five shares in the bank, on whose behalf the plaintiff was suing; and also to a distributive share in his deceased mother's estate, which was then under administration, and of which the deponent stated, he had been informed by the executor, that there was likely to be a residue divisible among her children.

Mr. Teed now moved, on behalf of the defendant, to discharge the dispaupering order, on the ground, first, that as the suit was attached to another branch of the court, the Master of the Rolls had no jurisdiction over the *ex parte* order, except for irregularity, whereas here it was the substance and not the form of the common affidavit which was questioned; 2dly. [*287] That there "was nothing in the affidavit filed by the plaintiff to falsify the defendant's statement that he was not worth £5 in the world, as the bank was entitled to retain the shares towards satisfaction of their debt, and would, no doubt, do so, the mortgaged estate being, as it was alleged, a deficient security; and as to the mother's estate, the statement respecting it was too loose, and there was nothing to show that the defendant's interest in it was such as he could raise money upon.

Mr. Walker, *contra*, observed that there was no claim of retainer in the pleadings, and that the shares were not even mentioned in them. On the point of jurisdiction, he cited *St. Victor v. Devereux*(a) as showing that this was a case for a special affidavit and a special application, as the common affidavit could not be made without a suppression of facts which the court ought to have been apprized of, in order that it might form its own judgment upon them.

(a) 6 Beav. 584.

1847.—Morton v. Dresser.

THE LORD CHANCELLOR.—There is no doubt if an *ex parte* order be obtained on a misrepresentation, the judge from whom it was obtained may discharge it; but the question here is, whether there has, in fact, been a misrepresentation: for I cannot assent to the proposition that the party was bound to go into all the details that have been suggested, if the result of them was, that he had not £5 available for the prosecution of the suit,—for that is the meaning of the common affidavit. If, instead of resting on the usual short affidavit, you are to require a detailed statement of the party's means, there will be no use in allowing persons to sue *in forma pauperis*, for the expense of the application would prevent them from ever making it. Now, as to the bank shares, it is clear that [*288] they are not available; for the bank would have a right to retain them, and their debt would only be for the balance. And if the shares are liable to be set off against the debt, they must be considered as “in question in the cause,” though not expressly referred to in the pleadings. Then, as to his alleged interest in his mother's estate: the plaintiff only says that some one has told him that the defendant has such an interest. For any thing that appears, it may be a mere shadow.

Mr. Walker.—If that were so, the defendant might have answered the affidavit. The Master of the Rolls had to decide upon the evidence before him.

THE LORD CHANCELLOR.—No: the judge may always call for further evidence. This party may be too poor to file an affidavit. The consequence of a dispaupering order may be extremely severe, preventing a party from making his defence. If the bank press for this advantage against this poor man, I will not allow it without hearing what the poor man has to say.

Mr. Teed then stating that his client was present, but that he was too deaf to be communicated with in court, the motion stood over in order that he might confer with him in private, and state the result of his explanation to the court on a future day.

1847.—Oldfield v. Cobbett.

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*OLDFIELD v. COBBETT.

1847: July 3.

Returns to writs of habeas corpus, when disposed of, are to be sent to the Record Office, and not to be re-delivered to the officer who made them.

ON a motion by the defendant, in person, to commit the keeper of the Queen's Prison for having, as it was alleged, made a false return to a writ of *habeas corpus* sued out by the defendant, it appeared that the return was not forthcoming, and, on inquiry, it was found that the practice was, when such returns were disposed of, to deliver them back to the officer who made them.

THE LORD CHANCELLOR, reprobated such practice, referring particularly to the inconvenience which it was calculated to produce in a case like the present, where the correctness of the return was afterwards questioned: and his Lordship ordered that in future all such returns when disposed of, should be sent to the Office of Records and Writs.

STURGEON v. HOOKER.

1847: July 3.

The Lord Chancellor will not hear a motion by way of appeal from an *ex parte* order pronounced by another branch of the court.

ONE of the Vice-Chancellors having made an order *ex parte* for an injunction, the defendant gave a notice of motion before the Lord Chancellor to discharge it.

Mr. *James Parker*, in proceeding to open the case, stated as the ground of the motion being made before his Lordship, that, though he should, if necessary, read [*290] new affidavits filed since the order below was made, he should also contend that the affidavits on which the order was made, were not sufficient to warrant it: and he referred to the practice, on appeal motions, of allowing new affidavits to be read.

1847.—*Sturgeon v. Hooker.*

THE LORD CHANCELLOR.—A motion to discharge an *ex parte* order is never considered an appeal from that order. It is suggested that the order is erroneous on the affidavits on which it was made; but that would be said in every case. This is a new motion. You must go to the Vice-Chancellor.

BUTLIN V. MASTERS.[1]

1847; July 7.

A bill by a vicar claiming, as such, a customary payment of 6*d.* in the pound on all lands and houses within the parish, was, on a re-hearing, retained with liberty to the plaintiff to bring an action; the Lord Chancellor considering that a more proper course than the one proposed to be taken by the court below, of directing first an issue to try the immemoriality of the custom, and then taking the opinion of a court of law upon the validity of such a custom; the case being one in which the jurisdiction of this court was resorted to merely as ancillary to a legal right.

Suggestion as to the propriety, in such cases, of going to law first, to ascertain the right, before filing the bill in this court.

Neither party to an issue directed by the court, is precluded, by going to trial, from afterwards appealing against the order by which it was directed.

THIS was an appeal by the defendant against a decretal order of Vice-Chancellor Wigram directing certain issues, one of which was, "whether the plaintiff, as vicar of the parish of St. Sepulchre, was entitled to a customary payment of 6*d.* in the pound on the yearly value of all the houses and lands within the said parish, or any part thereof." The other issue was in the same form, only pointing particularly to the houses occupied by the defendants: the answer, having "tra- [*291] versed the fact for their being within the parish, or the titheable places thereof.

The issues had been tried and verdicts found for the plaintiff.

The appeal now coming on to be heard, a preliminary objection was taken, that, after issues directed by the court had been tried, the unsuccessful party could not appeal from the order directing them; and a case of *Morrell v. Parker* was referred

[1] Same case, Post 529.

1847.—*Butlin v. Masters*.

to as now standing for judgment before the Lord Chancellor, in which the point had been raised and reserved.

THE LORD CHANCELLOR.—I remember Lord Eldon raising the objection on more occasions than one: but I do not see how it can be sustained, as the case is not distinguishable in principle from that of a reference to the Master, in which there is no doubt that an appeal will lie after the Master has made his report.

Mr. Romilly, Mr. Eagle, and Mr. Stinton, for the plaintiffs, then opened the case upon the merits; in the course of which they stated, that the real object of the court in directing the issues was to try merely the immemoriality of the alleged customary payment, leaving the legality of the custom, when established in point of fact, to be determined in a district proceeding; and that if the form in which the issues were directed should appear to have mixed up these two questions,(a) [292] it was "an error for which the learned Judge below was not answerable, as the issues had been settled by the counsel out of court. They added, however, that the error, if error there was, had been set right by the Judge at the trial, who had explained to the jury that it was the question of fact alone that they were to try.

In answer to a question from the court, after the plaintiff's case was closed,

Sir Francis Simpkinson and Mr. Smythe, for the appellant, said that the ground of the appeal was not the form of the issues, but the absence of any evidence to warrant them, and that they were prepared to contend that the bill ought to have been dismissed.

(a) The Reporter has been informed that this error in the form of the issues was noticed immediately by the Vice-Chancellor on the case coming back to him upon a motion made by the defendants for a new trial, and that he refused the motion unless the form of the issue were amended, which could not be done without rehearing the cause, at the same time suggesting, that if it was to be reheard, it had better be carried at once before the Lord Chancellor.

1847.—*Butlin v. Masters*.

THE LORD CHANCELLOR.—I will throw out my present opinion now, and if you ask any thing more than I am prepared to give you, I will hear you. I cannot reject the consideration that the jury have found for the plaintiff, though the verdict is not formally before me, so far as to dismiss the bill at once; but I think the case has miscarried from the beginning. The plaintiff's case is not founded on a common law right: for the payment which he claims is in respect of houses and lands, as to which no tithe or other payment is ordinarily due. It is founded on a special custom. Now the court has directed an issue to try whether the plaintiff is entitled to the customary payment which is claimed: but that is the whole *question [*293] in the suit; which is thus referred—law as well as fact—to the jury. That mode of directing the issue was calculated to confuse the mind of the jury. It is no answer to that to say that the Judge took pains to put to the jury the real question which it was intended to try; because the record will remain, and it will be impossible hereafter, when the question of law comes to be investigated, to treat the verdict of the jury upon this issue as a finding upon the question of fact alone.

The proper course, where the equitable jurisdiction is merely ancillary to a legal right, is to withhold the exercise of that jurisdiction until the legal right has been established. And it is a very awkward course to send the case first to a jury upon matter of fact and then to the court upon a matter of law, instead of putting the legal right of the party at once into a train of investigation.^(a)

I think, in this case, the proper course will be for the cause to stand over, with liberty to the plaintiff to bring such action as he may be advised.

I cannot but observe that, if in this and similar cases, whether

(a) See and distinguish *Malone v. Malone*, 8 Cl. & Fin. 179, where the plaintiff's title was an equitable one, though depending upon the fact of heirship. In the case of bills *quis timet*, the court is in the habit of directing an issue of mixed fact and law, as, whether the contemplated act will or may, if completed, operate to the damage and injury of the plaintiff. *Blakemore v. The Glamorganshire Canal Co.*, 1 My. & Keene, 154; *Dewson v. Pever*, 5 Hare, 415, (affirmed on appeal, July, 1847.)

1847.—*Butlin v. Masters*.

of patent rights or others, depending upon a legal right, the parties went to law at once, where they ultimately must go, instead of coming here in the first instance, where the jurisdiction is merely ancillary to the legal right, a great deal of expense might be saved.

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*DUNNING *v.* HARDS.

1847: July 7.

The usual direction in decrees in creditors' suits, that the creditors shall, before they are admitted, contribute their proportion to the expenses of the suit, does not prevent the court, on further directions, if the case warrants it, from ordering the plaintiff to pay all the costs of the suit. But if the suit be any thing more than a mere creditor's suit, the direction for contribution ought to be limited to the costs of that part of the suit in which all the creditors have a common interest with the plaintiffs.

THIS was a suit for the administration of the estate of James Hards deceased, who had been the sole acting executor of the will of one Loder, who died in 1810, having by his will bequeathed a legacy of £250 to his executors, in trust to invest it in government securities, and to pay the dividends to Mrs. Dunning for her separate use for life, and the principal on her death to her children.

James Hards had during his lifetime regularly paid to Mrs. Dunning the income of the legacy, as if it had been duly invested. On his death, however, in 1838, it was discovered that it had never in fact been invested; but there was found among his papers a policy of insurance which he had effected in 1820, on the life of Mrs. Dunning for £250, and on which he had regularly paid the premiums up to the time of his death.

The bill, which was filed by Mrs. Dunning and her children, on behalf of themselves and all other unsatisfied creditors of James Hards who should come in, &c., insisted that the plaintiffs were entitled to stand as creditors against the estate of James Hards, for the value of so much stock as might have been purchased with the £250 at the expiration of a year after Loder's

1847.—Dunning v. Hards.

death; and that they were also entitled to a lien on the policy in part satisfaction of that demand, and it prayed relief accordingly.

In support of the claim of lien, the plaintiffs relied on two letters written in 1812, by James Hards to Mrs. Dunning's husband, in answer to some application which *the [*295] latter had made respecting the payment of his wife's dividends.

In the first of those letters was the following passage: "In future the interest will be due on the 11th of June and 11th of December, subject to a legacy duty which will be deducted according to the age of Mrs. Dunning. Remember me to her, and say I will thank her to send me her age as soon as convenient." In the second letter, which was written about a week after, though he referred incidentally to the legacy as having been invested a year ago, and repeated that his reason for asking the age of Mrs. Dunning was the legacy duty, he spoke of having given instructions to his solicitor "to prepare a bond to be given to the other trustees."

The defendant, who was the son and only acting executor of the will of James Hards, in his answer, after stating that he had found the policy among his father's papers after his death, said, that he did not know what was his father's object in effecting it, but that if the matters stated in the bill respecting the legacy of £250 were true, he thought it probable that the policy was effected to secure that sum for the children. The answer also stated, that the assets of James Hards were not sufficient for the payment of his specialty creditors; and that not only had the plaintiffs' solicitor been so informed by the defendant's solicitor before the bill was filed, but an offer had at the same time been made, with the sanction of the specialty creditors, to give up the policy to the plaintiffs, in part satisfaction of the demand, if they would forbear from instituting the suit; but that the offer had been refused, the plaintiffs' solicitor observing, that if the estate was insolvent, the plaintiffs would get their costs at all events, and it was, therefore, for the interest of the specialty creditors to settle with them at once.

*At the hearing of the cause before Vice-Chancellor [*296] .

1847.—*Dunning v. Hards*.

Knight Bruce, his honor made a decree according to the prayer of the bill, including a declaration that the policy had been appropriated by James Hards as a security to the children for the legacy of £250, and also including the usual direction in creditors' suits, that the creditors who should come in should, before they were admitted, contribute to the plaintiffs their proportion of the expenses of the suit : subject to which direction the costs of the suit were reserved.

Against that declaration and that direction the defendant appealed.

Mr. *Russell* and Mr. *Southgate*, for the appellant, contended, as to the declaration, that there was nothing in evidence to warrant it ; and, as to the direction for contribution to the expenses, that though commonly inserted in decrees in creditors' suits, it was not applicable to a case in which, if the assets should turn out, as alleged in the answer, insufficient for the payment of the specialty debts, the defendant would be entitled on further directions, to show from the answer that notice of that fact had been given to the plaintiffs, and, thereupon, to ask that they might pay the costs of the suit ; that, at all events, such a direction was applicable only to suits which were for the general benefit of the creditors, and not to one like this, in which the principal object of the suit, viz., the claim of lien, was one in which the general body of the creditors had not only no common interest, but an interest directly opposite to that of the plaintiffs.

Mr. *Rolt* and Mr. *Craig*, for the respondents, contended that the second letter amounted to a promise of a security [*297] for the legacy, and that although it was "not such a security as was actually effected, still, considering the identity of the sum insured by the policy with the amount of the legacy, and the fact that James Hards had no other insurable interest in Mrs. Dunning's life, except that which his obligation to replace the legacy gave him, the court was justified in connecting the policy with the promise, and treating the two together as an effectual appropriation of the policy to secure the legacy.

1847—Dunning v. Hards.

As to the other point, they insisted that the clause was invariably inserted in all decrees in creditors' suits, and that it did not prevent the court, on further directions, from making such order as to costs as it might think fit.

THE LORD CHANCELLOR.—It is quite clear that there is not enough to support the declaration in the decree, as to the appropriation of the policy, though I think there is enough to raise matter of inquiry. There is nothing but an obligation to pay, and a policy effected for £250, payable on the death of the tenant for life. That would provide a fund for the children, but not for the wife. It is said an investment was promised, but it was an investment for the security of the mother as well as of the children : whereas this security is rather to her prejudice. At the same time one cannot but suspect that the effecting the policy had some connection with the breach of trust. What he really meant was, probably, to provide in that way a fund for repaying the money which he did not expect to have the means of repaying in any other way. However, if the plaintiffs wish for an inquiry, I cannot refuse it; but it must be at their expense, for if there be any further evidence, it ought to have been brought forward before the hearing.

**Mr. Russell* having then replied on the question of [*298] contribution to costs,

THE LORD CHANCELLOR said : It certainly is rather an inconvenient course to direct the creditors to contribute to the costs, as the condition of proving their debts, when after all it may turn out that the plaintiffs are liable to pay them all. But yet as the practice in that respect appears to be settled, I should not, on the ground of that inconvenience, disturb it, in an ordinary case of a mere creditors' suit. In this case, however, a large part of the suit has nothing to do with the creditors generally. The plaintiffs sue as creditors, it is true, but also for something independent of their claim as creditors. It seems hard in such a case to make the creditors contribute to the expenses of the whole suit. Justice seems to require that so much of the costs as have been occasioned by the claim of lien should be except

1847.—Dunning v. Hards.

ed. Let that part of the decree, therefore, stand with that qualification.

As to the other point, the declaration will be struck out, and, in lieu of it, there will be an inquiry, at the expense of the plaintiffs, whether they or any of them are entitled—I doubt whether “appropriation” would be the correct term—whether they are entitled to the policy of £250 as a security for or in satisfaction of the sum of £250 bequeathed to the plaintiff Mrs. Dunning for life, with remainder to her children.

[*299] *In the Matter of Sir JAMES LANGHAM, a Lunatic.

1847: July 9.

A committee, who, having been authorized by the court to expend a certain sum in rebuilding a farmhouse, expended half as much again in building one of larger size on a different site, was not allowed the excess; although, what he had done, appeared to be beneficial to the estate.

By an order made in this matter in July 1842, the Master's report was confirmed, approving of an outlay of 700*l.* for rebuilding a certain farm-house on the lunatic's estate, which was settled to the use of him for life, with remainder, in default of his issue (of which there was none,) to his brother for life, with remainder to his issue in tail; and liberty was given to the brother, who was committee of the estate, to enter into a contract accordingly.

Subsequently to that order the committee, conceiving that it would be beneficial to the estate, instead of rebuilding the farmhouse, as originally proposed, on the old site, to build a larger one in a more central position, with a view to enlarge the farm by the addition of some adjacent lands, entered into a contract for the erection of such larger house, the expense of building which having amounted to 1052*l.*, he presented a petition to be allowed that sum, instead of the 700*l.* in passing his accounts; and a reference was made to the Master to inquire whether the larger sum was a proper expenditure and beneficial to the lunatic's estate, and whether it ought to be allowed. The Master

1847.—In re Langham.

certified in the affirmative ; setting forth, in support of his opinion, the affidavits of several respectable surveyors, who stated among other things, that the building of the house on the altered site would dispense with the necessity of repairing certain other buildings on the farm, for which 90*l.* had been specially allowed by the order of July 1842.

**Mr. Bacon* now appeared in support of a petition to [*300] confirm that report, and stated that the presumptive next of kin of the lunatic were desirous that the estate should be properly kept up, and that they approved of what had been done as conducive to that end.

THE LORD CHANCELLOR refused to allow any thing beyond the 700*l.* and the 90*l.* allowed by the former order, saying that it was useless to apply to the court to sanction expenditure for the repairs of a lunatic's estate, if committees were to disregard the directions given, and then come to the court to sanction that disregard of its order. This was an extreme case: the court had given the committee leave to enter into a particular contract, and he took upon himself to enter into quite a different one, involving much greater expense. Such conduct was setting the court at defiance. He should therefore allow nothing beyond the sums he had mentioned, and refuse the costs of this petition.

**LENAGHAN and Wife v. JOHN SMITH and* [*301]
MARY SMITH.

1847: June 4.

A party entitled to a moiety of an ascertained fund cannot maintain a suit for payment of his share without making the person entitled to the other moiety a party, if, owing to a breach of trust, the whole fund is not forthcoming. *Semble*: And the decision in *Perry v. Knott*, (5 Beav. 293,) to the contrary disapproved.

THIS was an appeal from an order of the Vice-Chancellor of England, overruling a general demurrer, by the defendant, *Mary Smith*, to the bill.

 1847.—*Lenaghan v. Smith.*

The bill stated in substance that Mrs. Lenaghan and Mary Smith became entitled on the death of their mother in 1846 to the residue of a testatrix's estate in equal moieties. That the residue had been ascertained many years before and invested by the executors in the purchase of a sum of 2700*l.* stock : but that by a breach of trust on their part, it had been transferred into the name of the defendant John Smith, who was the father of the plaintiff and Mary Smith, and that he had in the year 1837 sold it out and converted the proceeds to his own use. The bill then stated that the surviving executor of the testatrix had died intestate, and that Mrs. Lenaghan had taken out administration *de bonis non* to her (the testatrix's) estate. And it charged that the plaintiffs had, by the means aforesaid, become, and were now in right of Mrs. Lenaghan, entitled to receive from John Smith the amount that the 2700*l.* stock would have sold for at their mother's death, or to call upon him to purchase that amount of stock in the name of Mrs. Lenaghan, as the personal representative of the testatrix ; and it prayed a declaration and decree against John Smith accordingly.

Mr. *Cooper* and Mr. *Marshall*, for the appellant, argued, that as it appeared from the statements of the [*302] bill that the fund had ceased to be assets, and had become a trust fund before the alleged breach of trust took place, the plaintiff, Mrs. Lenaghan, in her character of personal representative of the testatrix had nothing to do with it, and therefore that it was only as *cestui que trust* of a moiety that she could be entitled to any relief, and for that purpose Mary Smith was not a necessary party ; it having been decided by the Master of the Rolls in a case precisely similar, that a suit might be maintained for a breach of trust in respect of an ascertained fund by a party entitled to a moiety thereof without making the person entitled to the other moiety a party ; *Perry v. Knott*.^(a)

Mr. *Stuart* and Mr. *Bilton* appeared for the respondent, but

THE LORD CHANCELLOR, without hearing them, said he could

(a) 5 Beav. 293.

 1847.—*Lenaghan v. Smith.*

not help doubting the accuracy of the report of *Perry v. Knott* upon this point, as the Master of the Rolls was represented to have treated the case as identical with *Smith v. Snow*,^(a) in which the fund was still in existence and forthcoming; whereas in *Perry v. Knott*, as in the present case, it had been made away with by the trustees; and under these circumstances the claim could not be treated as a claim to a "distinct aliquot part of a distinct sum;" for *non constat* that the trustee was of ability to make it good; and then, if one *cestui que trust* were allowed to file a bill without making the other a party, he might sweep away all the property that was available for the purpose, and leave nothing for the other, who might perhaps be an infant. For which reason, his Lordship said, if the point ever came before him for decision, in a case where there had been a breach of trust, and the whole fund was not "forthcoming" [*303] he should not act upon the authority of *Perry v. Knott*. In the present case, however, it was not necessary to decide it, because the plaintiffs sought restitution, in their representative character, of the whole fund, and not merely of the moiety to which they were beneficially entitled.

Mr. *Cooper* suggested that as the appellant had been misled by the case of *Perry v. Knott*, there ought to be no costs of the appeal.

THE LORD CHANCELLOR.—It does not turn on *Perry v. Knott*. The costs must follow the ordinary rule.

 WYNNE v. STYAN.

1847: July 20, 22.

The personal representative of a deceased tenant for life of a mortgaged estate, is not a necessary party to a bill by the mortgagee against the remainderman, although the bill pray payment of an arrear of interest which accrued during his lifetime.

(a) 3 Madd. 10.

1847.—Wynne v. Styan.

Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgaged title, until his death, and the same rule applies where the mortgagee is a tenant-in-common with others, of the mortgaged estate.

Form of issues directed in a foreclosure suit to ascertain whether a mortgage deed forty-five years old had ever subsisted as a security, and if so, whether it had been satisfied.

THIS was an appeal by several of the defendants from a decretal order of Vice-Chancellor Knight Bruce directing certain issues.

The plaintiff was the executor and residuary legatee of Margaret Styan, who was herself the co-executrix with her sister Elizabeth of another sister, Mrs. Wynne, who died in 1811; and the object of the suit was to enforce an equitable mortgage alleged to have been created by Mrs. Wynne by an indenture dated in 1802, for securing to her sister Elizabeth the sum of 5000*l.* and interest.

[*304] “The mortgaged estate was devised by Mrs. Wynne to her two sisters Margaret and Elizabeth for their joint lives, and the life of the survivor, with remainder to the defendant M. Styan with remainder to the defendant J. Styan, with other remainders over. Elizabeth had died in 1830, and Margaret in 1837; and the bill represented that the plaintiff was ignorant of the existence of the mortgage deed until 1842, when he discovered it accidentally in a box of miscellaneous papers relating to the property of the three sisters; who, it appeared, had lived together from a short time after the date of the indenture until the death of Mrs. Wynne, and the two survivors of whom had lived together from that time until the death of Elizabeth.

The defendants by their answer put the plaintiff to the proof of the indenture ever having been delivered by Mrs. Wynne, suggesting that about the time at which it bore date, certain family arrangements were made between the sisters, which rendered it probable that the deed was executed provisionally only, and that the sum which it was intended to secure was at that time paid off out of other funds, and that the indenture had accordingly never been delivered or intended to be acted on. They

1847.—Wynne v. Styan.

also relied on the Statutes of Limitations and on the presumption of satisfaction.

There was no evidence of the bond ever having been recognized by any of the three sisters: and it was proved that Margaret, in taking out probate of her sister Elizabeth's will, swore her personal estate under 500*l.*, which circumstance was relied upon as showing that the indenture, if it had ever been in force, had before that time been satisfied.

At the hearing of the cause, the Vice-Chancellor directed six issues. 1st. Whether Elizabeth ever *released [*305] the mortgage debt or any part thereof during her lifetime. 2nd. Whether the mortgage debt or any part thereof remained due at the death of Mrs. Wynne. 3rd. Whether it was unsatisfied at the death of Elizabeth. 4th. Whether it was unsatisfied at the death of Margaret. 5th. Whether the deed was, at the time of the death of Elizabeth, in the custody or power of Elizabeth and Margaret as executrices of Mrs. Wynne. 6th. Whether, at the time of the death of Elizabeth, the deed was in the custody or power of Elizabeth, as creditor or mortgagee thereunder.

Before the cause came on to be reheard, the first tenant for life of the equity of redemption, M. Styan, died, and on its now coming on,

Mr. *Swanston* and Mr. *Busk*, for the appellants, objected, that, if the plaintiffs intended to ask for interest for the six years prior to the filing of the bill, M. Styan's personal representative was a necessary party, as the defendants would be entitled to reimburse themselves out of his estate whatever interest they should be decreed to pay, which had accrued during his occupation of the mortgaged premises.

THE LORD CHANCELLOR.—The plaintiff's remedy is against the mortgaged estate, and he has nothing to do with any adjustment of accounts between the defendants and the representatives of the deceased tenant for life. They are, therefore, not necessary parties.

As to the effect of the Statute of Limitations,—The counsel

 1847.—*Wyane v. Styan*.

for the plaintiff relied on *Rafferty v. King*,^(a) and *Burrell v. Lord Egremont*.^(b)

*THE LORD CHANCELLOR.—It is clear that where the [*306] mortgagee is alone in the receipt of the rents of the mortgaged estate, the statute does not run; and I think the same principle must apply when the mortgagee is only tenant in common of the equity of redemption: for a tenant-in-common is entitled to receive the whole of the rent, subject to account with his co-tenant. That view of the case is confirmed by the fact, that one tenant-in-common of the equity of redemption may redeem; which assumes that, as against an incumbrancer, one is entitled to the whole.

As to the issues,—It was contended, on the part of the appellants, that the absence of all evidence as to the custody from which the deed was produced, was fatal to the plaintiff's case; and that, at all events, the original subsistence of the security ought not to have been assumed, as it had been by the Vice-Chancellor in the issues he had directed. It was further insisted that the issues were unnecessarily numerous, and that the defendants were prejudiced by the direction that they should be plaintiffs on the trial of them, as it would throw on them the task of establishing the affirmative, which ought rather to be thrown on the plaintiff in the suit; and *Mercer v. Wall*,^(c) was referred to. On the other hand, it was said that that direction had been given as a benefit to the defendants, in order that they might have the right of reply.

THE LORD CHANCELLOR.—It is quite clear that the court has not information enough to act upon at present, and, therefore, [*307] that *some issue must be directed. And I think it is desirable that there should be separate issues, applicable to the time of the death of the three sisters respectively, because the situation of the parties differed at those three periods. But it certainly ought not to be assumed, as it appears to be by the issues directed by the Vice-Chancellor, that the mortgage debt

(a) 1 Keen, 601.

(b) 7 Beav. 205.

(c) 5 Q. B. Rep. 461.

 1847.—Wynne v. Styan.

ever was due: and I think, moreover, that the issues which he has directed are unnecessarily numerous. The first is included in the second; and the fifth and sixth are mere matters of evidence. Three issues would embrace the whole—Whether the deed was a subsisting security for the sum of 3000*l.*, or any part thereof; first, at the death of Mrs. Wynne; secondly, at the death of Elizabeth; and, thirdly, at the death of Margaret. And, as the defendant is now desirous of waiving the benefit which it was intended to give him, by making him plaintiff at the trial, let that direction be omitted.

 HENDERSON v. EASON.

[*308]

1847: May.

Whether one tenant-in-common of a farm who has alone occupied and cultivated it, is liable, independently of contract, to account with his co-tenant for a moiety of the profits, *Quære*.

An executor who had been tenant-in-common with his testator of a farm which the latter had alone cultivated, claiming to be a creditor of the estate for a moiety of the profits, the court directed an action to be brought to try the right.

UNDER a decree for taking the common accounts of a testator's estate, the defendant, the executor, claimed to retain £900 as the amount of a moiety of the profits made by the testator from the cultivation of a farm, of which he and the defendant were tenants in common, but which had been occupied by the testator alone, for several years previous to his death.

The Master having allowed the claim, exceptions were taken to his report, but were overruled by the Vice-Chancellor of England. The plaintiffs appealed.

Mr. *Anderdon* and Mr. *Bagshawe*, in support of the appeal, relied on *M Mahon v. Burchell*,^(a) as conclusive in their favor. They also referred to *Wheeler v. Horne*^(b) and *Sturton v. Richardson*.^(c)

(a) *Ante*, p. 127.(b) *Willes*, 208.(c) 13 *Mees & W.* 17.

1847.—Henderson v. Eason.

Mr. *Wood*, *contra*, took a distinction between the occupation of a house which yielded no profit, unless it were let to a tenant, and the occupation of a farm, from the cultivation of which profits were derived beyond the mere benefit of occupation; contending, that, if, in a case of the latter kind, one tenant in common received all the profits, it was the same thing, and equally within the statute of Anne,^(a) as if he had received rent.

In answer to an inquiry from the court, whether there was any express decision at law to that effect, Mr. *Wood* stated that he did not know of one.

[*309] *THE LORD CHANCELLOR.—If the right which is claimed by the defendant exists at all, it must be under the statute; for the case of *Wheeler v. Horne* clearly shows that there is no such right at common law; and as the only remedy which the statute gives is an action, it is clear that there is no right to relief in equity, unless the case be one in which such an action would lie. And, as it appears that there is no precedent of an action, in such a case this court will not allow the claim, until, at least, the party has established his right at law. The proper course, therefore, will be, to direct an action to be brought, in which the defendant, the executor, will be the plaintiff, and the plaintiffs here defendants, they admitting, for the purpose of the action, that they are executors.

It is the more necessary to adopt that course in this case, because the facts which raise the question are not regularly before the court upon the Master's report, but upon affidavits only, which, at this stage of the suit, could only be admitted, as evidence, by consent; and I observe, that some of the parties beneficially interested are infants.^(a)

(a) 4 Ann. c. 16, s. 27.

(a) In consequence of the facts not being sufficiently stated in the report to admit of this question being discussed in the ordinary way, upon exceptions, it had been raised in the court below by a petition in the nature of exceptions, supported by affidavits.

1847.—*Glascott v. Lane*.

*GLASCOTT *v.* LANG.

[*310]

1847: July 10, 14, 17.

If a bill makes a case of actual fraud, and at the hearing, the fraud is disproved or not established, the court will not in general allow the bill to be used for any secondary or inferior kind of relief to which the plaintiff might otherwise have been entitled, but will dismiss it at once.

But where a bill sought to set aside a bottomry bond, as having been concocted in a fraudulent conspiracy between the captain of the ship and the obligee, though the fraud was disproved of at the hearing, the court, *at the request of the defendant*, directed the usual inquiries, for the purpose of ascertaining how much of the sum secured by the bond was a proper subject of bottomry.

Semble.—A bottomry bond given by the captain of a ship at a foreign port is not necessarily void, because there was time during the ship's stay at such port for the captain to have written home to his employers and to have received an answer; but, at all events, if the omission of the captain, under such circumstances, to communicate with his employers is intended to be relied on as invalidating the bond, it ought to be specifically charged in the bill, otherwise, although it appear in evidence, it will not be regarded.

THIS was an appeal from a decree of Vice-Chancellor Knight Bruce, by which it was ordered, that a bottomry bond, which the defendants sought to enforce against a ship called the *Margaret Ogilvie*, of which the plaintiffs were mortgagees, should be delivered up to be cancelled, and that the defendants, the obligees, should pay the costs of the suit.

The plaintiffs' mortgage was dated in October 1835; the ship, which was then at London, had been chartered the month before, by Messrs. Freeland, Ker & Co., merchants at Rio de Janeiro, to proceed to the Clyde, there to take in a cargo for Rio, where she was to unload and take a fresh cargo for a port in the Mediterranean, where the freight due under the charter party was to be paid, "less £300 to be paid in the Clyde upon the vessel clearing out, and such sums as might be paid for the ship's use at the port or port or ports of loading and unloading."

The ship arrived in the Clyde, in December 1835, from whence, having, taken in a cargo, she sailed to Rio, and from thence with a new cargo to Trieste, where she arrived on the 9th of October 1836.

1847.—*Glascott v. Lang.*

[*311] "In the meantime the plaintiffs had written to the charterer's agents at Glasgow a letter, dated the 2d of September, 1836, enclosing a notice of their mortgage, and requesting an account of the freight of the voyage: in answer to which those agents wrote a letter of the 5th of September, 1836; in which they said—"In answer to your letter of the 2d inst. we have to observe that, having already settled for the homeward freight with the owners from whom we chartered the ship, you will have to look to them for settlement of any claim you may have on it."

On the receipt of that letter, the plaintiffs wrote to Messrs. Reyer and Schlik, their agents at Trieste, enclosing a notice of their mortgage, to be served on the captain of the ship when she should arrive at that port, and stating that, as the owner had improperly received the greater part of the freight, after it had been mortgaged to the plaintiffs, they were determined to dispose of the vessel under their power of sale, for which purpose the captain was to be directed to bring the ship home, after waiting at Trieste a reasonable time, so as to get a freight; and the agents were instructed to make such advances as might be necessary for enabling the vessel to perform her voyage home.

Messrs. Reyer and Schlik acknowledged the receipt of that letter by another, dated the 13th of October, in which, after announcing that the ship had just arrived, they added—"From the papers we have seen, the original charterers advanced to the owner on account of the freight. The freight from Rio, therefore, is due to their agents here, and cannot be taken out of their hands. For what their friends are not covered, they will have to come upon the vessel. It may be satisfactory to you [*312] to know, that we have engaged with them that "the vessel shall take freight for London, for which destination we expect she will be dispatched in a few weeks."

During the voyage from Rio to Trieste, the master who had sailed with the ship from the Clyde died, and the first mate took the command, and brought her to Trieste, where, having received no instructions from the owner, in answer to a letter which he had written from Gibraltar, communicating the death of the former master, he was appointed and confirmed captain

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by the British consul at that port, and in that character he executed the bottomry bond in question to John Bryce, who was a partner in the firm of Lang, Freeland & Co., the Trieste agents of Freeland, Ker & Co., for the sum of 483*l.* 10*s.*, at 14 per cent. maritime interest.

The ship sailed home with a cargo, leaving Trieste on the 19th of December, 1836, and was taken possession of, on her arrival, by the plaintiffs as mortgagees, who received the homeward freight; and, on proceedings being threatened in the Admiralty Court to enforce the bond, they filed this bill against Freeland, Ker & Co. and their agents at Glasgow and Trieste, alleging that they had very lately discovered that no sum of money was ever advanced by Lang, Freeland & Co., or any other person, to the captain of the ship at Trieste, and that the bond was not, in fact, given to secure any monies advanced for seamen's wages, repairs, necessities or otherwise on account of the ship, or for any monies which were, in fact, advanced to the captain on account of the ship, as pretended; but that the bond was given without consideration, and in fraud of the plaintiff, and that the same was contrived between the defendants Freeland, Ker & Co., and the captain and Bryce, with a view to defraud the plaintiff, and in order to give a priority to the firm of Freeland, Ker & Co. over the plaintiffs in respect of certain advances made, or alleged to have *been made, by [*313] those defendants to Ogilvie, the owner, previous to the ship setting sail on her outward voyage: and that Bryce had no interest in the bond, except as trustee for Freeland, Ker & Co.; that the plaintiffs were advised, that under these circumstances the bond was fraudulent and void as against them, and that the defendants ought not to be allowed to proceed upon it in the Court of Admiralty.

The bill then suggested various pretences as made by the defendants, that the alleged advances were for seamen's wages at Trieste and for necessities and expenses of the ship, there and at Rio; whereas the plaintiffs charged the contrary, and called for minute discovery as to the nature and particulars of such alleged expenses.

The bill then charged that Messrs. Reyer and Schlik, the

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plaintiff's agents at Trieste, were fully authorized to make advances on account, and for the use of the ship, if any were necessary, and that the defendants were fully aware that such was the case, but that no application was made by the captain, or by the other defendants to Messrs. Reyer and Schlik for such advances.

The bill then charged, that, if in fact any such advance was necessary, it ought to have been made out of the freight payable under the charter party, which amounted to 790*l.* 16*s.*, but that the defendants pretended that large advances were made by them or their agents, for the purpose of freeing the ship from arrest in the Clyde and for other purposes connected with the ship both before and after she set sail, amounting in the whole, with interest, to the sum of 975*l.* 5*s.* 1*d.*, being 184*l.* 9*s.* 1*d.* more than the amount payable under the charter party; and that the

amount of the necessary expenses at Trieste was 299*l.* [*314] 0*s.* 11*d.*, making together with the 184*l.* *9*s.* 1*d.*, the sum of 483*l.* 10*s.*, the amount of the bottomry bond, and that the defendants pretended they were entitled to appropriate the whole of such freight in satisfaction of the last mentioned advances, and to pay themselves the alleged balance of 184*l.* 9*s.* 1*d.*, by means of bottomry, without allowing for or appropriating any part of such freight toward the payment of the alleged necessary expenses at Trieste; whereas the plaintiffs charged the contrary, and that if any of such advances were made to Ogilvie or otherwise, on account of the ship, either previously to or after the ship's setting sail from the Clyde, the same were made after the defendants or their agents had notice of the mortgage, and they insisted that the defendants were not entitled to appropriate the said freight in satisfaction of the alleged advances to the prejudice of the plaintiffs' security, or, in any event, not to a greater extent than the sum of 300*l.* mentioned in the charter party.

The bill then charged, that the defendants could under no circumstances be justified in raising money upon bottomry to pay the balance due, or alleged to be due, in respect of the alleged advances; and it sought a particular account of the freight earned by the ship in the voyage, and of the advances alleged

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to have been made previously to or in the course of it; and it prayed that the bond "so given in fraud of the plaintiffs as aforesaid," might be delivered up to be cancelled, and for an injunction.

Soon after the bill was filed, the plaintiffs moved before the Vice-Chancellor of England, for an injunction; which was granted on bringing the amount of the bond into court, and the order was afterwards affirmed, on appeal, by Lord Chancellor Cottenham.^(a)

*Certain admissions were entered into for the hearing [315] of the cause, in lieu of evidence; by which it was admitted on the part of the plaintiffs, that the amount of freight payable at Trieste, under the charter party, was 790*l.* 16*s.*, but that before the arrival of the ship at that port, the charterers or their agents had made advances on account of the ship, amounting with interest, to the sum of 975*l.* 5*s.* 1*d.*, and exceeding therefore the amount due from them under the charter party, by the sum of 184*l.* 9*s.* 1*d.* With respect to these advances it was admitted, that on the arrival of the ship in the Clyde, at the beginning of December 1835, she was attached at the suit of several creditors of Ogilvie, whereupon the agents of the charterers at Glasgow were about to throw up the charter party and to commence proceedings against Ogilvie to recover the 300*l.*, which had been previously paid to him under the charter party, but that they were induced to suspend such proceedings at the request of Ogilvie, in order to give him time to make arrangements with his creditors: that such arrangements having been made, the agents proceeded to load the ship, but considerable supplies and outfits being necessary before she could proceed on her voyage, and Ogilvie having no funds of his own wherewith to furnish them, the agents, at his request, employed a ship-broker at Glasgow to fit her out for the voyage, they giving him their guarantee for the amount: that after the supplies had been furnished, and when nearly the whole of the cargo was on board, the ship was arrested at the suit of one Gray, another creditor of Ogilvie, for the sum of 100*l.*, which the agents were obliged to pay and did pay, in order to liberate the ship, and that short-

(a) See 3 *Myl. & Cr.* 451.

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ly after the ship had sailed, they were called upon under their guarantee to pay, and did pay, to the ship-broker at Glasgow, the sum of 264*l.* 19*s.* 3*d.*, being the amount of his bill for supplies and other expenses, which it was admitted were necessarily *incurred in order to enable the ship to proceed on her voyage: that a further sum of 262*l.* 19*s.* 1*d.* was paid by Freeland, Ker & Co. at Rio, for provisions, port dues, and other necessary disbursements on account of the ship, thereby making up, together with interest, (and including the sum of 300*l.* paid to Ogilvie,) the before mentioned sum of 975*l.* 5*s.* 1*d.*

It was further admitted on the part of the plaintiffs, that by the laws of Trieste, Lang, Freeland & Co. were entitled to have sequestered the ship there, for payment of the balance of 184*l.* 9*s.* 1*d.* due on the outward voyage to Freeland, Ker & Co., and that they had actually threatened to do so, and that some of the sailors, who had been engaged only as far as Trieste, left the ship there and demanded their wages, while the rest of the crew demanded payment of part of their's for the purchase of clothes, &c., and that by the law of Trieste, the ship was liable to be sequestered for both those demands; and that the captain applied to Lang, Freeland & Co. to lend him on bottomry such sum as would be sufficient to set the ship free from them, and to pay her expenses at Trieste, and to supply her with necessary provisions for the homeward voyage, and that Lang, Freeland & Co. having consented to do so on being allowed interest at 14 per cent., gave credit to Freeland, Ker & Co. for the balance of 184*l.* 9*s.* 1*d.*, and advanced the rest of the money that was wanted for the aforesaid purposes amounting to 299*l.* 0*s.* 11*d.*, which together with the said balance made up the sum of 483*l.* 10*s.*, for which the bond was given.

On the other hand, it was admitted on the part of the defendants, that the agents of Freeland, Ker & Co. at Glasgow had notice of the plaintiffs' mortgage from the certificate of [*317] registry on which it was endorsed, *before they gave the guarantee above mentioned to the ship-broker, and before they paid the 100*l.* to the arresting creditor; and further, that by the common course of post between Trieste and Great

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Britain, in the months of October and November 1836, there was between the 9th of October, the day of the ship's arrival at Trieste, and on the 16th of November 1836, the date of the bond, sufficient time for the captain to have written to Great Britain and to have received an answer.

It did not appear that the captain had made any application to Messrs. Reyer and Schlik for funds at Trieste, and the first letter which he appeared to have written after his arrival there to Great Britain, was dated the 25th of October, and was addressed to Ogilvie, in which, after stating that he had procured a cargo, which was then loading, and after expressing his regret at not having received an answer to his letter from Gibraltar, he stated that he should not remain at Trieste more than three weeks, that the vessel had no money for the homeward voyage, and that as far as he could see he should be obliged to take up money on bottomry. There was also in evidence a letter from Messrs. Reyer and Schlik to the plaintiffs, dated the 16th of March 1837, in which was the following passage:—"Messrs. Lang, Freeland & Co., as the consignees of the ship, being considered her legal representatives, no application was made to us for advances, not could we offer any, the freight having been made over, previously, to Messrs. Lang, Freeland & Co. by the former captain, and being their property, which we had no means of laying our hands on; and your instructions having been only to make advances out of that Rio freight."

At the hearing of the appeal,

**Mr. Russell*, *Mr. Heathfield*, and *Mr. Prendergast*, [*318] appeared for the plaintiffs.

Mr. Rolt and *Mr. Stinton*, for the defendants, (the appellants.)

The counsel for the appellants observed, that the jurisdiction of this court over bottomry bonds rested on fraud, and not on account, and that the issue raised by the bill was not whether every item of the amount for which the bond was given, was or was not, according to maritime law, a proper subject of bottomry, but whether the bond was not in its entire concoction so com-

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pletely fraudulent as to be altogether void. And they contended, that not only was the existence of such fraud negatived by the whole history of the voyage, but that the correctness of the several items for which the bond was given, and the necessity for resorting to bottomry were so fully established by the admissions, as to preclude any further inquiry on those points, and to entitle the defendants to an immediate decree dismissing the bill. As to the objection that before any of the advances were made by the charterers, their agents had notice of the plaintiffs' mortgage, they contended, that that was immaterial, because the transfer to them of the ship having been endorsed on the certificate of registry merely as a mortgage, and the plaintiffs not having taken possession of the ship under it, Ogilvie still continued owner for all purposes of management, and the charterers were entitled to deal with him, and him only, as such, 3 & 4 W. 4, c. 55, s. 42; *Kerswill v. Bishop*.(a) As to the omission of the captain to apply for funds either to the plaintiffs in England, or to their agents at Trieste, on which they said the Vice-
 [*319] Chancellor had expressly founded his *decision, they contended, that a captain who found himself without funds in a foreign port, was under no obligation to communicate with the owners at home, and that the question in the Court of Admiralty always was, whether he had resources in the place where the ship happened to be;(b) and that as to the agents at Trieste, it was evident from their own letter of March 1837, that an application to them would have been useless, as they considered themselves authorized only to make advances out of the freight earned on the outward voyage, and the whole of that was exhausted before the ship's arrival at Trieste. As to the propriety of including in the bond the balance of 1841., being an antecedent debt, they referred to *The Hebe*.(c)

The counsel for the respondents relied on the ground taken by the Vice-Chancellor, and insisted that the increased facilities of communication between distant ports which had recently been afforded by steam navigation, had destroyed the foundation of the distinction formerly taken in bottomry cases between a home

(a) 2 Cr. & J. 529. (b) *Abbott on Ship*, pp. 155—157, 7th ed. (c) 10 Jur. 297.

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port and a foreign port, and that whenever the course of post between a foreign port and the residence of the owners afforded the means of communication before the ship was obliged to sail, such foreign port was in principle the same thing as a home port.

In answer to a question from the Lord Chancellor, whether there was any case in which it had been held that a captain of a ship in the Mediterranean could not raise money on bottomry without sending home to the owners to know whether they could furnish him with funds, they said they did not know of any such case: but that the principle on which all the cases went was, "that necessity alone could justify taking [*320] up money on bottomry; *Heathorn v. Darling*,^(a) *Soares v. Rahn*,^(b) *La Ysabel*;^(c) and as a *reductio ad absurdum* of the doctrine contended for on the other side, they instanced the case of a ship at Boulogne, and the owner resident at Folkestone, within two hours sail, and asked whether in such a case, a captain would be justified in taking up money on bottomry without first applying to his employers.

July 17.—THE LORD CHANCELLOR.—In this case the bill prayed that a certain bottomry bond might be delivered up to be cancelled, and that an injunction might be granted to restrain the obligees from suing upon it in the Court of Admiralty, and an injunction was granted upon the equity asserted by the bill. Now the bill makes a case of actual fraud. After stating the circumstances, it alleges that the plaintiffs had recently discovered that the bond was not given for expenses necessary for the outfit or service of the ship, but that it was entirely a contrivance between the captain, Messrs. Freeland, Ker & Co., and their agents at Trieste, to exclude the interest of the plaintiffs as mortgagees of the ship: that the bond was unnecessary and uncalled for, and a mere piece of machinery for the purpose of gaining for the defendants priority over the plaintiffs' demand.

That case wholly fails: no case of fraud is made out at all. If there is any question at all as to the right of the defendants

(a) 1 Moore, P. C. C. 5. (b) 3 Moore, P. C. C. 1. (c) 1 Dods. Adm. Rep. 273.

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to recover upon the bond, it does not depend upon the circumstances on which the bond originated, but upon the question how far the moneys secured by it came within the rule [*321] which authorizes captains of ships in foreign parts to take up money on bottomry. It is unnecessary to enter into the detail of the matters connected with this latter point, because they are not introduced into the bill as a substantive part of the plaintiffs' case, but in anticipation merely of the defence expected to be set up to the charge of fraud; and the whole case, so far as it relates to fraud, is completely negatived by the admissions which have been made in the cause.

That being so, I was anxious to know on what ground the Vice-Chancellor proceeded in decreeing the cancellation of this bond; and from a note of his judgment with which I have been furnished, it appears that he proceeded upon this, that the ship remained long enough at Trieste to have enabled the captain to communicate with the owners in England, and that, therefore, the captain was not in a situation to justify him in taking up money on bottomry.

Now, in the first place, that is a ground which has no authority to support it. I asked repeatedly during the argument, whether there was any case to be found in which that circumstance had been considered sufficient to avoid a bottomry bond, and the counsel were unable to produce one, or any case at all like it. A case, I think, was produced, which seemed to imply the contrary, but certainly no case at all supporting that proposition. And even if that proposition could be supported, it would not support the decree, because it is no part of the case made by the bill that the bond was void because the captain being at Trieste did not send to England for supplies. The bill contains no such charge, although if that circumstance was intended to be relied on, it ought to have been distinctly put in issue, that the defendants might have had an opportunity of explaining it.

[*322] Under these circumstances, if the case had rested there, I should have been very much disposed to follow a rule generally acted upon, and certainly founded in justice, that where a bill is filed making a case of alleged fraud, and the

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fraud is disproved or not established, the court will not allow such a bill to be used for any secondary purpose; because the door of this court being always open to allegations of fraud, it would be unjust, and much to be deprecated, to afford any encouragement to such allegations by allowing a party to try the experiment of obtaining relief on that ground, and if it failed, to fall back upon his bill for some inferior kind of relief.

But in this case—and it is a very unfortunate one, because, after all, the amount in question is small—I am afraid that if I adopted that course, I should be involving the parties in a new course of litigation; as the effect of dismissing the bill would be, to leave the defendants to their remedy upon the bond: for where a bottomry bond is sought to be enforced, it becomes a question, whether there is evidence that the circumstances were such as to justify the raising of all the money that was raised upon the bond; and although there is very strong reason to believe from the letter written by the plaintiffs' agents, that the captain had no resources for raising money to enable him to perform the voyage, otherwise than by bottomry, the case upon that point is not at present in such a shape as to justify the court, without further inquiry, in acting on the supposition that the whole of the money raised on the bond was necessarily raised for the purposes of the voyage. Upon that question, therefore, if I dismissed the bill, the parties would be involved in a new litigation: and being very anxious to prevent such a result, which would be very much to the injury of both parties, I throw it out for their consideration, *whether they will [*323] not avail themselves of this suit, which has already proceeded so far, for the purpose of determining the whole matter in difference between them; which will be done by taking an inquiry similar to that directed in the suit of *Dobson v. Lyall*,(a) *which was lately before me,—whether the [*324]

(a) 3 *Myline & Craig*, 453, n. As it might be inferred from the short statement of this case in the note here referred to, that the bill proceeded exclusively, as in the principal case, on the ground of fraud, it has been thought desirable to insert the following more detailed report of it:—

DOBSON v. LYALL.

In the year 1832, the plaintiff took a mortgage upon the ship *Tam O'Shanter* (of

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circumstances were such as to justify the raising of all the money that was raised on this bond. If the defendants insist on hav-

which one Lindsay was the master and sole owner,) and upon its future earnings, except the freight of the outward voyage which it was then about to make to the East Indies. The mortgage was duly registered, and the ship sailed. On her arrival at Calcutta, she was threatened with arrest upon a bottomry-bond, which Lindsay had been obliged to give at Rio on the outward voyage, and Lindsay himself was arrested upon certain bills of exchange to a large amount, which he had accepted in England, payable to the defendants, Messrs. Lyall, merchants, at Calcutta, and for securing payment of which, with other sums, they held a second mortgage upon the ship, in which the plaintiff's mortgage was recited. In that state of things an agreement was entered into between Lindsay and Lyalls that they should advance such a sum as might be necessary to pay off the Rio bond and to equip the ship for her homeward voyage, on having the amount secured by a new bottomry-bond; and that Lindsay should charter the ship to them for the homeward voyage, and that the sum payable under the charter party should be set off against the private debt due to the Lyalls. A new bond was accordingly executed for 50,000 sicca rupees (£3367 15s. 10½d.,) out of which the Rio bond was paid off; and on the same day, Lindsay executed a charter-party to the Lyalls for the homeward voyage, and signed a receipt endorsed on it for 30,618 sicca rupees.

On the return of the ship to England, the Lyalls commenced proceedings in the Court of Admiralty upon their bond; whereupon the bill was filed, alleging that, to some extent at least, the bond was given, not for necessities of the ship, but for the independent debt due from the owner to the Lyalls, and that it was on that account wholly void, and not a valid obligation upon the ship as against the plaintiff, even to the extent of the money applied in paying off the Rio bond; but that, even if it were valid to that extent, the amount due upon it was less than the amount due from the Lyalls under the charter-party and in respect of various other sums alleged to have been received by them on account of the ship. And the prayer of the bill was, that the bond might be declared void as against the plaintiff, and that the proceedings in the Admiralty Court might be stayed, and that an account might be taken of what was due to the plaintiff on the mortgage, and that the ship might be sold and the proceeds applied in payment thereof: or if the court should be of opinion that the bond was to any extent entitled to priority over the plaintiff's mortgage, then that an account might be taken of what was due on it to such extent, and that in taking such account, the defendants might be debited with the freight earned on the homeward voyage, and with other sums alleged to have been received by them on account of the ship; and that after payment to them of what, if any thing, should be found due to them on that account, the residue of the proceeds of the ship might be applied in payment of the plaintiff's demand.

The defendants, by their answer, stated that, so far from having included any private debt of their own in the sum for which the bond was given, the sums advanced by them on account of the ship at Calcutta, including the amount of the Rio bond, exceeded by upwards of £900, the amount secured by the Calcutta bond.

On the original hearing before the Master of the Rolls, his Lordship was of opinion

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ing *the bill dismissed, they may involve themselves in [*325]
a new litigation, and open a new inquiry on these points,

that, from the nature of the transaction between the Lyalls and the owner at Calcutta (adverting particularly to the receipt endorsed on the charter-party,) the homeward freight was, as against the Lyalls, at least, to be considered as a resource which the captain had at Calcutta, and that, as it appeared that that sum, together with a sum of about £700 receivable by the captain at Calcutta for averages on the outward voyage, would have been sufficient to defray the necessary expenses of the ship there, including the payment of the Rio bond, without resorting to bottomry, his Lordship declared the bond void as against the plaintiffs. On an appeal, however, from that decision, Lord Cottenham, being of opinion, upon the evidence, that the bond would probably be found valid to some extent at least, reversed the decree, and directed a reference to the Master to inquire and certify what, at the date of the Calcutta bond, was due and payable upon the Rio bond, and what sum of money was at that time necessary for the purpose of discharging such other demands against the ship as were necessary to be discharged, and of defraying such expenses as it was necessary to incur in order to enable the ship to proceed upon and complete her voyage to London, and what at that time were the resources of the master at Calcutta applicable to the procuring such sums as were necessary to discharge what was so due and payable upon the Rio bond, and to meet the other demands and expenses before directed to be inquired into.

The Master, by his report, found that at the date of the Calcutta bond, 2948*l.* 9*s.* 6*d.* was due for principal and interest on the Rio bond, and that the sum of 2323*l.* 9*s.* 7*d.* was at that time necessary, &c. [following the terms of the reference,] and that the sum of 753*l.* 4*s.* (being the amount of certain sums payable by various parties at Calcutta for averages in respect of the outward voyage) was the only resource which the captain then had at Calcutta, applicable &c.

The plaintiff took exceptions to that report, which were allowed by the Vice-Chancellor of England, but were afterwards overruled on appeal by Lord Lyndhurst, and the report was confirmed.

The charterer of a ship in a foreign port, who had notice of a prior mortgage on the ship and its future earnings, agreed with the master, who was also owner, to advance on bottomry such sum as should be necessary to equip the ship for the homeward voyage, and a bottomry bond was accordingly executed, but the amount of the necessary expenses of outfit turned out greater than that for which the bond was given. Held, that, as against the mortgagee, he was not entitled to set off the excess against the sum which became due under the charter-party.

On further directions, the question was, whether the defendants were entitled, as against the plaintiff, to retain out of the money payable under the charter-party, the excess of the sums of 2948*l.* 9*s.* 6*d.* and 2323*l.* 9*s.* 7*d.* over the amount secured by the bond; which they claimed a right to do, on the ground that the advances constituting such excess had been the means by which the freight due under the charter-party had been earned.

The Vice-Chancellor, however, decided that, having advanced those monies with

1847.—*Glascott v. Lang.*

[*326] when they might have an inquiry in this *suit. If the parties desire it, I will give them an opportunity of considering the matter.

July 21.—The case having accordingly stood over for several days,

Mr. *Rolt* now stated, that as the amount of the bond was in court, and the effect of dismissing the bill at once would necessarily be to restore the fund to the plaintiffs, and leave his clients without any security for payment, even if they should succeed in the Court of Admiralty, the ship having been sold, and the proceeds received long ago by the plaintiffs, his clients were desirous of accepting the offer made by his Lordship, for an inquiry similar to that in *Dobson v. Lyall*.

THE LORD CHANCELLOR.—Then the inquiry will be by consent.

Mr. *Russell*.—No. I would rather have the bill dismissed ; I do not consent to any thing. According to the view your Lordship has taken of the pleading, the defendants have a right to the inquiry.

THE LORD CHANCELLOR.—If that be your opinion, let the inquiry be taken at the defendants' request.

[*327] *ATTORNEY-GENERAL v. GIBBS and others.

1847: July 20.

On the hearing of an appeal presented by a defendant, the court having intimated that a question included in it, relating to costs, could not be gone into in the absence of co-defendants who had not been served, counsel were, in the course of

notice of the plaintiffs' mortgage on the homeward freight, they had no such right ; and, accordingly, in directing the accounts to be taken, he declared that the defendant was not entitled to set off any thing against the freight except the bond ; and that decision was affirmed on appeal by Lord Cottenham, 5th June 1847.

1847.—Attorney-General v. Gibbs and others.

the argument, instructed to appear for them gratis. But the Lord Chancellor refused to sanction such an appearance, and disposed of the case as if they had not appeared.

THE defendant Gibbs having been decreed to account for certain charity funds of which he had the management, and also to pay the costs of the suit to the hearing, and to repay to the relators the costs which they were ordered to pay to the co-defendants, who were dismissed, he appealed from the whole decree.

On his counsel objecting to that part of the decree which ordered him to repay to the relators the costs of the other defendants, it was stated on the other side, that those defendants had not been served with the petition of rehearing; whereupon the Lord Chancellor said, he could not allow that part of the case to be gone into in their absence, as it would be unjust to the relators to alter that, and yet leave the part of the decree standing which ordered them to pay the costs in the first instance.

In the course of the argument, counsel were instructed to appear for the other defendants gratis, and they argued in support of the decree, so far as it ordered the relators to pay to those defendants the costs of the suit.

THE LORD CHANCELLOR, in delivering judgment, after expressing his entire concurrence in the decree on other points, said—that on this point he had felt considerable difficulty in determining how to act, from the manner in which the question had been brought before him.

As matters stood at the commencement of the argument, said his Lordship, I could not have entertained *the ques- [*328] tion, because the other defendants, in whose absence it could not be discussed, had not been served with the petition. In the course of the argument, however, counsel have been instructed for them, and have argued that they were unnecessary parties from the first, in which case the relators would have been bound to pay them the costs, without any right to recover them against Gibbs. I cannot, however, lose sight of the circumstances under which they have voluntarily appeared, to discuss that question. It was clearly not their interest to appear, for the

1847.—Attorney-General v. Gibbs and others.

decree gives them their costs, and I could not have deprived them of that benefit if they had not appeared. I must therefore assume, that their appearance on a petition with which they were not served, was the result of an arrangement with Gibbs; that they were brought here by him, not, of course, to contest any right with him, but merely because I suggested, in the course of the hearing, that I could not entertain that part of Gibbs' appeal in their absence. I cannot approve of that sort of appearance; it is clearly prejudicial to the other parties: and under these circumstances, whatever I might have done if the parties had at first been brought regularly before me, I shall not vary this part of the decree. The result, therefore, will be, to affirm the whole decree, and dismiss the appeal with costs.

A question being raised, whether that would include the costs of the co-defendants,

THE LORD CHANCELLOR said—I dismiss the appeal with costs; those who are parties to the appeal will have their costs.

Mr. *Jas. Parker*, Mr. *Heathfield*, Mr. *Lloyd* and Mr. *Bates*, were Counsel in the case.

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*WILLIAMS v. POWELL.

1847: July 21.

When one of several *cestui que trusts* institutes a suit for relief in respect of a breach of trust, he is bound, in the conduct of the suit, to take care of the interests of the others as well as of his own.

THIS was an appeal by a defendant from part of a decree of the Vice-Chancellor of England.

Mr. *James Parker*, in support of the appeal, stated that the plaintiff and the appellant were entitled in equal moieties to a residuary estate, in respect of which the bill charged the de-

 1847.—*Williams v. Powell*

pendants, the executors, with various breaches of trust, in having employed the trust-moneys in their trade, &c. and prayed an account on that footing; and that the plaintiff had taken a decree for such an account as to his own moiety, but, as to the other moiety, for the common accounts only.

Mr. *Rolt* appeared for the executors.

Mr. *Bates* for other parties.

THE LORD CHANCELLOR.—A party entitled to a share of a residue, may make what arrangement he likes with the accounting party, independently of the parties entitled to the other shares: but if he comes to the court, he is bound to take care of the interest of the others as well as of his own. The court does not go into the amount of any particular share, without first ascertaining what the fund to be divided is. This decree, however, totally neglects the rights of the other parties, as if the plaintiff alone were interested in it. If that were allowed, the effect would be, that a party would be bound by proceedings not adapted to ascertain what his rights are. The appeal must be allowed.(a)

**POYNDER v. GREAT NORTHERN RAILWAY.* [330]

1847: July 27.

The condition of a bond given by a railway company, under the 85th section of the 8 Vict. c. 18., on taking possession of land before the purchase-money was ascertained, was "on demand to pay to the owner, or on demand to deposit in the bank the amount of such purchase-money when determined." Held, that the condition was bad, as giving the party claiming to be owner, the option of compelling payment either to himself or into the bank, whatever the title might turn out, and an injunction was granted till a proper bond should be executed.

PENDING an arbitration as to the amount of purchase-money and compensation to be paid by the company for certain lands

(a) See *Lanaghan v. Smith*, ante, p. 301.

1847.—*Poynder v. Great Northern Railway.*

of the plaintiff, which were required for the railway, the company took possession of the land under the power given by the eighty-fifth section of the Lands Clauses Consolidation Act, (8 Vict. c. 18,) paying into the bank the amount fixed by the surveyor, and tendering to the plaintiff a bond with two sureties for the same amount. The condition of the bond was, "That if the railway company do and shall on demand pay, or cause to be paid to the said Mr. Poynder, his heirs, executors, administrators, or assigns, or do and shall on demand deposit in the Bank of England, under the provisions of the act, the amount of all such purchase money and compensation as shall, in the manner provided by the said act, be determined to be payable by the said company, in respect of the land intended to be entered on by the company, with interest at 5 per cent., &c., then the bond to be void," &c.

The plaintiff, being dissatisfied with the bond, filed this bill for an injunction to restrain the defendants from constructing their railway across his land, or continuing in possession thereof, insisting that the condition of the bond was objectionable in two respects; first, because it gave the company the option of either paying the money into the bank or to the plaintiff; whereas the plaintiff being, as he alleged, owner of the land in fee, was entitled to have the money paid to himself: and secondly, [331] because the words "on demand," which were "not to be found in the act, would embarrass the plaintiff in his remedy upon the bond.

The Vice-Chancellor of England, having granted an injunction as prayed by the bill,

Mr. Rolt and Mr. Dennison now moved to dissolve it.

Mr. Bacon and Mr. Craig, contra.

THE LORD CHANCELLOR.—As the bond stands, it gives the plaintiff the option of either receiving the money or having it paid into court, whatever the case may be; and therefore the plaintiff is rather a gainer than a loser by the departure from the strict form prescribed by the act: but that very circumstance

1847.—*Poynder v Great Northern Railway.*

strikes me as the most serious objection to the bond ; for the object of the act was to protect the interest of parties under disability, by having the money paid into the bank, where any such parties were concerned : whereas this bond would enable the plaintiff to compel payment to himself in any event. He says, indeed, he is owner in fee ; but I cannot take that for granted, before the title is investigated. I think, therefore, the condition ought to be, to pay either to the plaintiff or into the bank, as the case may require, according to the provisions of the act.

Whatever ground, therefore, the Vice-Chancellor may have proceeded upon in granting the injunction, I see no reason for dissolving it. On the contrary, I think it is for the interest of all parties, including the railway company itself, that it should be continued until they execute a bond in a proper form. If I were to dissolve the injunction, the railway could not go on, for *the plaintiff would not be satisfied, but would [*332] bring an ejectment. I find that the terms of the act have been departed from without any reason assigned, and I see a possible prejudice from that departure to other parties who may be interested. Let the injunction, therefore, be continued until the company shall give a bond in conformity with the provisions of the act.

Mr. *Bacon* suggested that the injunction should be absolute, as the Vice-Chancellor had granted it, and when the company should have given a proper bond, they might come to dissolve it.

THE LORD CHANCELLOR.—There will probably be another application in either case : but the most likely way of saving the expense of one, will be to limit the injunction, as I have proposed in the first instance.

*STEVENS v. KEATING.

[*333]

1847 : Jan. 22, July 29

The court will not, generally, in doubtful cases, restrain by injunction the infringement of an asserted legal right, until its validity has been established by an action

 1847.—*Stevens v. Keating*.

at law ; but, *secus*, where there has been long uninterrupted enjoyment under a patent, that being regarded as *prima facie* evidence of title.[1]

When the court grants an injunction, the order ought not merely to direct that an action shall forthwith be brought, with liberty to the parties to apply in case of delay, but to give such directions of its own, in the first instance, as will insure the speedy trial of the action.

An injunction granted pending an action to be brought by the plaintiff, for the speedy trial of which special directions were given, was dissolved on the ground of the plaintiff not having duly complied with those directions.

THE object of this suit was to restrain an alleged infringement of a patent granted to the plaintiff in 1835, for a particular process in the manufacture of cement. A motion having been made for an injunction before the Vice-Chancellor of England, his Honor granted it, at the same time ordering that the plaintiff should forthwith bring an action. On appeal from that order, the Lord Chancellor upheld the injunction, on the ground of the length of undisturbed enjoyment under the patent. And in the course of his judgment, adverting to an observation which had been made by counsel in the argument, that some late decisions of his Lordship were supposed to have narrowed the jurisdiction formerly exercised by the court in patent cases, particularly in those in which the patent was of several years standing, his Lordship made the following remarks :—

THE LORD CHANCELLOR.—Before I advert to the particular provisions of the specification, I wish to make an observation in reference to what I have been informed of from the bar, but of which I was not aware before, namely, that an impression exists that I have expressed some opinion adverse to the principles and doctrines laid down by Lord Loughborough, Lord Eldon, and every succeeding Chancellor, including myself, who have exercised jurisdiction in these matters ; and for that purpose I was anxious to *find out what cases there were

[1] See *Hill v. Thompson*, 3 Meriv. 621, 622 ; *Isaacs v. Cooper*, 4 Wash. C. C. R. 259, 260 ; *Washburn v. Gould*, 3 Story R. 156, 169 ; *Orr v. Littlefield*, 1 Woodb. & M. 13 ; *Woodworth v. Hall*, 1 Ibid. 248 ; *Hovey v. Stevens*, 1 Ibid. 290 ; *Harmer v. Plane*, 14 Vesey, 130 ; *Rickford v. Skewes*, Webs. Pat. Cas. 211, 213. See the able and elaborate opinion of Mr. Justice Woodbury in the case of *Orr v. Littlefield*, above cited and *Morgan v. Seward*, Webs. Pat. Cas. 167.

 2a

 1847.—*Stevens v. Keating.*

on which that impression was founded. None were cited on either side to justify such an impression, but I have looked into a book that seems very accurately to collect the cases, I mean Mr. Hindmarsh's work on Patents, and there I find all the cases on the subject arranged in regular order, the two last of which were decided by myself—*Collard v. Allison*, reported also in 4 *Mylne & Craig*, and *Neilson v. Thompson*—in both of which, the doctrine of former judges is distinctly recognized. I have no recollection of having ever used an expression calculated to raise the impression which I am told at the bar exists, and I am anxious to state that if I have, it was quite inadvertently, and that no intention ever existed, or now exists in my mind, to do that which I am told it is supposed had done. I have no reason to question the soundness of that doctrine, and if I had, I am not so rash as to take on myself to overturn a system that has existed for a century, and which has been the recognized doctrine of the most learned chancellors who have administered justice in this court.

Intending, therefore, to act on that principle, and not having the least intention to alter it, I will only state what I suppose, if such an impression has existed, must have given rise to it. I have, in common with other judges, of whom Lord Eldon was one, frequently expressed my opinion, that in doubtful cases great care ought to be taken by this court not to grant an injunction which is at all likely to prove unfounded; because if it turns out to be unfounded, you are doing an irreparable injury to the party restrained, whereas by withholding it, you may be permitting some injustice, but certainly not an injustice at all equal to that which you are doing by improperly granting it. That rule, however, is confined to cases where there is a serious *doubt in the mind of the judge as to whether [*335] the title to an injunction is made out or not, for if the court sees that there is a clear case for an injunction, it would be absurd to say, go to law and prove that which you have already proved here, before I grant the injunction.

In patent cases, however, a rule steps in which is quite consistent with the general rule to which I have just referred, and, indeed, is only an instance of the exception which a correct

1847.—*Stevens v. Keating.*

statement of that rule must always include, viz. that long and uninterrupted possession shall be considered such *prima facie* evidence of title as to justify the court in protecting the patent right by an injunction until its invalidity, if it be invalid, shall have been established by an action at law.

Having, in conformity with these observations, expressed his concurrence in the Vice-Chancellor's order as regarded the injunction, his Lordship asked, whether the order contained any directions with a view to the speedy trial of the action.

Mr. *Stuart*, for the plaintiff, said, that his Honor's usual practice was, merely to direct the action to be forthwith brought, with liberty to apply ; and, if the plaintiff did not proceed with proper expedition, to dissolve the injunction.

THE LORD CHANCELLOR.—The defendant ought not to be left to take his chance of the opinion the court may form on the question, what is proper expedition ; it is much better for the court to give special directions of its own in the first instance. I propose, therefore, to confirm the Vice-Chancellor's order, [336] so far as it continues the injunction pending the action, and directs the action, but to add, that the trial shall be at the Sittings after this Term, and whatever is required by either side, for the purpose of giving effect to that, I will order.

In the discussion of the minutes of the order, on a subsequent day,

Mr. *Bethell*, for the plaintiff, asked, amongst other things, that the defendant might deliver the particulars of his objections, together with his pleas ; and also suggested, that the defendant should either not raise the question of want of novelty, or deliver to the plaintiff all the patents, documents, &c., on which he relied, in support of such objection.

THE LORD CHANCELLOR.—The application for that ought to be made to a Judge at chambers. I do not mean to change

1847.—*Stevens v. Keating.*

the rules of pleading in courts of law, or to interfere on any point which goes to the merits of the trial. My only object is, to put the parties upon such terms respectively, as may ensure the speedy trial of the question between them.

July 29.—Mr. *Webster*, for the defendant now moved to dissolve the injunction, on the ground of the plaintiff's delay in bringing the action to trial, stating, that the cause was in the paper for trial during the sittings in February, but that the plaintiff then got it postponed on account of the absence of his leading counsel. And that on its coming on lately a second time, he had again refused to go to trial in consequence of there not being a sufficient *number of special jurymen [*337] present, and the refusal of the plaintiff to pray a tales.

Mr. *Follett, contra.*

THE LORD CHANCELLOR.—The injunction was granted in January: we are now at the end of July, and the action has not been tried. So far as the action was concerned, the plaintiff had a perfect right, if he thought that his interests would be prejudiced by trying it either in the absence of his counsel or with a deficient number of special jurymen, to avail himself of any means which the rules of a court of law afford for postponing the trial. But it is a different question, whether he is to exercise that discretion to the prejudice of the defendant, and whether an injunction, which was granted on the understanding that the action should be speedily tried, is to be continued, because the plaintiff has not found it convenient to go to trial when he might have done. It is quite clear, that, after the delay that has taken place, the injunction must be dissolved; but the defendants must undertake to keep an account.

1847.—Okill v. Whittaker.

[*338]

*OKILL v. WHITTAKER.

1847 : July 14.

Premises were sold for the residue of a term of which both parties at the time supposed that eight years only were unexpired, and the price was fixed expressly on that supposition. It afterwards appeared that twenty years were in fact unexpired at the time of the sale. But a bill by the vendor to make the purchaser a trustee of the term for the twelve additional years was dismissed.

THE plaintiffs were trustees, for sale, of, amongst other property, certain leasehold premises, which they held under a demise executed in 1755, for a term of three lives and twenty-one years; and, in March, 1836, they put the leaseholds up to auction under particulars of sale, in which they were advertised to be sold "for the remainder of a term of twenty-one years, which commenced on or about the 3d of December, 1823," the plaintiffs being then under the impression that the last survivor of the lives had died about that time, although the last life did not in fact drop until March, 1835. The property not having been sold at the auction, they agreed a few days afterwards to sell it under the same description to one Whittaker for £300; and by an indenture, dated the 22d of March, 1835, after reciting the indenture of demise, and "that the last survivor of the lives died on the 3d of December, 1823, when the term of twenty-one years commenced; and that the plaintiffs had agreed with Whittaker for the sale thereof to him for £300, for the residue then unexpired of the lease;" it was witnessed that, in consideration of the said sum of £300, the plaintiffs, in exercise of the said power, &c., assigned the premises to Whittaker, "to hold the same for all the residue then to come and unexpired of the said term of twenty-one years granted by the said lease, and which term commenced on or about the 3d of December, 1823."

The purchase money was duly paid, and Whittaker took possession of the premises, and remained in such possession [*339] till his death in 1842, when they passed to *the defendants, his executors. In 1845, the plaintiffs filed this bill, alleging that they had lately discovered their mistake as to the time when the last life dropped, and praying that, under the

1847.—*Okill v. Whittaker.*

circumstances, it might be declared that Whittaker was in equity only entitled to the premises for the residue of a term of twenty-one years, computed from the 3d of December, 1823, and that the defendants might be decreed to re-assign them, and to account for the rents as from the 3d of December, 1844.

The defendants, by their answer, admitted that the last surviving life did not in fact drop until March 1835; but they stated their belief that Whittaker had attached very little importance to the precise length of time the lease had to run, having brought, as they believed, with a view to obtain a renewal, which, though not a matter of right, would, in all probability, be obtained. It was, however, proved, on the part of the Plaintiffs, by the agent who had negotiated the sale to Whittaker, that, in the discussion of the terms, the latter inquired particularly how much of the lease remained unexpired, and that, in the written proposal signed by Whittaker to be submitted to the plaintiffs, these words, "there being eight years from December next," were inserted at the express request of Whittaker himself. It was also in evidence that the fair price of the property on that supposition would have been about 294*l.*; but, for the longer period, 495*l.* at least.

Vice-Chancellor Knight Bruce having, at the hearing, dismissed the bill with costs, the plaintiffs appealed.

Mr. *Anderdon* and Mr. *Hall*, for the appeal, contended that, upon the principle on which money paid by one party to another under a mutual misapprehension *or ignorance [*340] of facts, *Kelly v. Solari*,^(a) *Bell v. Gardiner*,^(b) the court would relieve the plaintiffs in this case, as had been done in *Bingham v. Bingham*,^(c) *Calverley v. Williams*,^(d) *Stapylton v. Scott*,^(e) *Willan v. Willan*,^(f) *Grieverson v. Kirsop*,^(g) *Tyler v. Beversham*.^(h)

THE LORD CHANCELLOR, without hearing the other side, said—It is impossible on this bill to give any relief. It goes far

(a) 9 Mees. & W. 54.

(d) 1 Ves. 210.

(g) 5 Beav. 283.

(b) 4 Man. & Gr. 11.

(e) 13 Ves. 425.

(h) Ca. t. Finch, 80.

(c) 1 Ves. 126.

(f) 16 Ves. 72.

1847.—Okill v. Whittaker.

beyond any of the cases that have been cited. The plaintiffs do not ask to rescind the transaction altogether: nor could they; for, after ten years' occupation and expectation of the benefit of renewal, it would be impossible to restore the purchaser to his original situation. What they say is, that the contract was improperly executed by the assignment, and they ask that what remains of the term after the expiration of the eight years may be reassigned. But what is that, but to call upon this court to decree specific performance of a contract with a variation? For the thing that both the vendor agreed to sell and the purchaser to buy, was the residue of the term, and not a portion of the residue.

Suppose a party proposed to sell a farm, describing it as "all my farm of 200 acres." and the price was fixed on that supposition, but it afterwards turned out to be 250 acres, could he afterwards come and ask for a reconveyance of the farm, or payment of the difference? Clearly not; the only equity being that the thing turns out more valuable than either of the parties supposed. And whether the additional value consists in a longer term or a larger acreage is immaterial.

[*341] "Some of the cases cited were cases in which the parcels in the deed embraced more than the parties intended to deal with. But the misfortune of this case is that here the plaintiffs did intend to sell all the remaining interest in the lease, but by their own mistake they misdescribed what that interest was. I cannot distinguish such a case from that of a bill to compel specific performance with a variation; for the object of the bill is to introduce a new term: either to make the purchaser pay more, or to make him a trustee of the rest of the term. That cannot be done.

The appeal must be dismissed with costs.

1847.—Dunstan v. Patterson.

DUNSTAN v. PATTERSON.

DUNSTAN v. PATTERSON.

1847: July 26.

A bill filed for redemption of a mortgage, and an injunction to restrain a sale under a power alleged to have been fraudulently inserted in the deed, contained various charges of oppression and misconduct against the defendant, on the ground of which it prayed that he might pay the costs of the suit.

On a motion for an injunction supported by affidavits of those charges, the defendant submitted to an immediate account, the plaintiff undertaking to pay what should be found due, and further directions and costs were reserved. Held, on a subsequent hearing of the cause for further directions, that the affidavits filed on the former occasion could not be read, the first order having shut out all the merits except the account. And an order giving the plaintiff the costs of the suit on the ground of those affidavits, was on appeal dismissed, and the defendant was allowed his costs according to the ordinary rule.

THESE suits were instituted by two sisters for the redemption of two mortgages for 500*l.* each, but upon which, they alleged, that a small part of that sum only had been actually advanced, the defendant, who was a solicitor, having undertaken to apply the balances in payment of certain other debts due from the plaintiffs respectively; which he had not done. The bills charged the defendant with various other acts of oppression and imposition in connection with the mortgages, alleging, "amongst other things, that he had fraudulently inserted ["342] in the deeds a power of sale, in default of payment within six months, of which power he was about to avail himself, and they prayed an injunction to restrain him from so doing.

Shortly after the bills were filed, the plaintiffs moved, upon affidavits, before Vice-Chancellor Knight Bruce, for injunctions; but, on the hearing of the motions, an order was made, whereby "the defendant consenting, and the plaintiffs undertaking to pay what should be found due," it was referred to the Master to take an account of what was due to the defendant upon the mortgages, and also to tax certain bills of costs, which the defendants claimed against the plaintiffs; and further directions and the costs of the suits were reserved till the Master should have made his report.

1847.—*Dunstau v. Patterson.*

The Master, by his report, found that 155*l.* only was due for principal and interest on one of the mortgages, and 245*l.* on the other; and he taxed off rather less than one-sixth of the bill of costs.

Upon the hearing of the causes for further directions, an order was made, by which, after reciting the report, and the affidavits filed on the former occasion, it was ordered that the plaintiffs should respectively pay to the defendant within a week what had been found due from them upon their respective mortgages; and that thereupon the defendant should transfer, reconvey or reassign the mortgage debts^(a) and premises, free from [*343] *all incumbrances, &c., and deliver up all deeds &c. to the plaintiffs respectively, or to whom they should appoint. And it was referred to the Taxing Master to tax the plaintiffs their costs of the suits, and it was ordered that such costs, when taxed, should be set off against the amount of the defendant's bills of costs which had been taxed under the former order, the balance, if in favor of the plaintiffs, to be paid to them by the defendant, and *vice versa*.

The defendant appealed from so much of that order as related to the transfer of the mortgage debts, and the costs of the suit.

The appeal now coming on to be heard,

Mr. *Bethell* and Mr. *Hardy* appeared for the appellant.

Mr. *K. Parker* and Mr. *Malins*, for the respondents, proposed to read the affidavits on the question of costs, but

THE LORD CHANCELLOR said, he could not attend to them. On a motion for an injunction the parties had consented to an immediate decree. He could only refer to what, by that consent, they had agreed should be done. If the plaintiffs had intended

(a) In the course of the argument, the Lord Chancellor asked whether this part of the order was objected to below, and it was stated that it was; the fact being, though it was not distinctly so stated, that the objection was taken only before the registrar on the drawing up of the order, the point not having been discussed in court.

1847.—Dunstan v. Patterson.

to have the costs disposed of with reference to circumstances disclosed by the affidavits, they had mistaken their course : they ought to have made those circumstances part of the reference to the Master.

They then adverted to the circumstances of there being receipts indorsed on both the deeds for £500 as evidence, *pro tanto*, of the imposition which the plaintiffs complained had been practised upon them.

***THE LORD CHANCELLOR.**—The rights of mortgagor [*344] and mortgagee depend, first, upon the contract between the parties ; and, secondly, on the practice of this court respecting those contracts. And, considering that a very large part of the real property of this country is subject to mortgages, those rules are of paramount importance, and ought to be strictly adhered to.

The first question is, how far these parties have by their contract departed from the rule and practice of this court which must be observed, unless they have, by their contract, interposed some other rule between themselves. According to that practice, a mortgagor is bound to pay principal, interest, and costs,—that is, of course, costs properly incurred ; but, without some special case, a mortgagee is as much entitled to his costs as to his principal and interest.

Here are bills filed by two ladies, as owners of the property in mortgage. What the bills state, I do not inquire into, that being quite immaterial ; for if they made any case against the defendant for relief different from the ordinary relief between mortgagor and mortgagee, they have departed from it by the decree to which they consented upon the motion for an injunction. That decree merely directed that an account should be taken of what was due on the mortgages, and in respect of certain bills of costs not included in them, reserving further directions and costs. In that respect, as well as in several others, the decree differs from the ordinary decree in redemption suits, which directs payment of what the Master should find due for principal, interest, and costs, and, in default of payment, that the plaintiff should be foreclosed. In this case, these directions *were reserved for further order ; but the question [*345]

 1847.—*Dunstan v. Patterson.*

is, why a different mode of administering justice is to prevail, because there have been two decrees instead of one. The defendant only asks to be put in the same situation as he would have been in if the suits had taken the ordinary course, except, so far as he has, by the decree, departed from that course. Now I have asked in vain for any authority to show that a mortgagor has a right to require the mortgagee to assign the mortgage debt when he is paid off. That is a departure from the contract beyond all doubt, and not justified by the law and practice of the court. I think, therefore, that in imposing that term upon the defendant, the decree is erroneous.

Then, as to the costs, what is the case made against the mortgagee to deprive him of his costs? The only circumstance is, that the deeds are endorsed with receipts for £500, though it appears that much smaller sums were actually advanced: and on that I am asked to decide that the mortgagee has forfeited what he is, independently of a special case, entitled to. Possibly the plaintiffs may have had such a case, and if they had, I lament that they have mistaken their course. But great danger would arise from departing, upon any speculation of hardship to these plaintiffs, from a rule which is perfectly established, and which, considering the interests involved, is most important to be adhered to. I think, therefore, the mortgagee must have his costs.

Mr. *Bethell* then suggested that the decree should be altered by striking out the direction for transfer of the debts, and by appointing a day for payment of what was due for principal and interest, and directing that, *in default of payment, the plaintiffs should be foreclosed.

THE LORD CHANCELLOR.—I am not sure of that. Here you proceed on an undertaking. You must, therefore, not avail yourself of your right of foreclosure.

INNES v. MITCHELL.

1847: Aug. 4.

Gift of an annuity of £300 to the testator's three daughters, and the survivors and survivor, with a gift over to the last survivor, of the sum set apart to answer the annuity,

1847.—*Innes v. Mitchell*.

After the death of one of the daughters the fund set apart was lost by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two: but after their deaths a sum of money forming part of the residue, but of less amount than the original fund, becoming available: Held (reversing the original decision) that, as the last survivor had had no opportunity of receiving the capital during her life, the annuity was to be considered as continuing for her benefit, after her sister's death, until her own, and, therefore, that she was entitled to an apportionment, in respect of the arrears of such annuity during that interval, as well as in respect of the principal fund.

THIS case is reported, on the hearing before Lord Lyndhurst C., in the first volume of these reports.^(a)

It now came on to be re-heard before Lord Cottenham on the petition of the parties interested under the will of Mrs. Mitchell, who complained that, by Lord Lyndhurst's order, no part of the fund in question was apportioned to them in respect of the annuity to which Mrs. Mitchell was entitled from the death of Mr. Stewart in 1837 to her own death in 1845.

Mr. Js. Parker and *Mr. Miller* for the appellants.

Mr. Stuart and *Mr. Follett* for the respondents.

*THE LORD CHANCELLOR.—I have not been informed [*347] on what ground Lord Lyndhurst proceeded in this part of his order; but I cannot reconcile it upon any principle with the rest: for while the order gives Mrs. Mitchell the benefit of a moiety of the annuity so long as she was entitled only to a moiety, yet when she became entitled to the whole, it gives her nothing. If the capital had been actually receivable by her on her sister's death, that would have been right: because, having the power of receiving the capital, she would have had no claim to any apportionment in respect to the income which it produced after that time. But there was, in fact, no fund then forthcoming: the fund now in question did not fall in till the year of her death. Her annuity must be considered as continuing until it was put an end to by the principle money falling in. I think she must be considered to have been entitled to her annuity

(a) 1 Phill. 710.

 1847.—Innes v. Mitchell.

until that time, because, till then, nothing had happened to put an end to it, or to enable her to put an end to it by receiving the principal. The order must be altered accordingly.

[*348]

*In re TOWNSEND, a Lunatic,

AND

In the Matter of the 1 W. 4, c. 60.

1847: Aug. 4.

The costs of proceeding under the 1 W. 4, c. 60, s. 3, for the purpose of obtaining a reconveyance of a mortgaged estate from a lunatic mortgagee, are to be borne by the lunatic's estate.

THE lunatic being mortgagee of an estate,

Mr. *Crawford* appeared in support of a petition by the mortgagor, stating that he was ready to pay off mortgage debt, and praying that a person might be appointed to receive the money, and to reconvey the estate, in the place of the lunatic.

The only question was, whether the costs of the petition and of the proceedings consequent thereon should be paid by the mortgagor, or out of the lunatic's estate.

Mr. *Crawford* cited *Ex parte Richards*,^(a) in which Lord Eldon held that such costs were payable by the lunatic's estate, and *Ex parte Baker*,^(b) and *Ex parte Clay*,^(c) two subsequent cases in which that rule had been acted upon or recognized.

Mr. *Bacon*, *contra*, referred to *Ex parte Marrow*,^(d) in which his Lordship had expressed his disapprobation of that rule.

THE LORD CHANCELLOR.—The reasoning in *Ex parte*

(a) 1 J. & W. 264.

(b) Shelford on Lunacy, p. 381.

(c) Ibid. p. 393.

(d) Cr. & Phill. 142.

1847.—In re Townsend.

Richards is not very satisfactory; but I see it has been twice acted on; and that is enough to establish the practice. The extra costs, therefore, occasioned by the lunacy of the mortgagee, must be paid out of his estate.

*BOUVERIE v. BOUVERIE.

[*349]

1847: July 28.

In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take and the contingency to which the survivorship refers is to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument.

THE question in this appeal arose upon the following clause in a testator's will:

"I give to my daughter Katherine Bouverie, the interest of all I have in the stocks for her sole use; and at her death I give the stock to her children, to be equally divided between them, together with the interest to be laid out for their use, in case their mother dies before they arrive at the age of twenty-one: in case one dies, then the others are to have share and share alike; the survivor to have the whole: should they all die before the age of twenty-one, I then give the said stock to my five nieces and my nephew, equally to be divided between them." In a subsequent part of the will, the testator appointed his said daughter Katherine Bouverie his residuary legatee.

Several of the children of Mrs. Bouverie having died during her lifetime above the age of twenty-one, the question arose at her death, whether the personal representatives of those children were entitled to shares in the stock bequeathed by the above mentioned clause, or whether the gift was confined to those children who both attained twenty-one and survived their mother.

The Vice-Chancellor of England decided, that the children

1847.—*Bouverie v. Bouverie*.

who died in their mother's lifetime were excluded; on the ground (as was now stated) that the only express reference to the age of twenty-one, in connection with the disposition of the capital, occurred in the ultimate gift over, from which it was to be *inferred that the words "in case one dies," in the [*350] prior clause, referred to some other period, which could only be the death of the mother.

Mr. *Wood*, Mr. *Schomberg*, and Mr. *Cairns*, for the appellants, relied on *Haws v. Haws*,^(a) *Mendes v. Mendes*,^(b) *Lord Salisbury v. Lambe*,^(c) *Crozier v. Fisher*.^(d)

Mr. *Bethell* and Mr. *Spurrier*, *contra*, cited *Cripps v. Wolcott*,^(e) in which, upon a bequest to A. for life, and after his death to his children B., C. and D., and the survivors or survivor of them, as tenants in common; Sir John Leach held, that the period to which the survivorship referred, was the death of the tenant for life: and they contended, that a gift to several and the survivors or survivor as tenants in common, was the same thing as a gift to several, with a direction that, "in case one die, then the others were to have share and share alike."

THE LORD CHANCELLOR.—In *Cripps v. Wolcott* the question was, as to the effect of the words, "and the survivors," in determining the class who were to take; whereas, here the question is, as to the effect of the words referring to survivorship in divesting an interest, which is clearly vested by the preceding clause.

Mr. *Wood* in reply.

[*351] THE LORD CHANCELLOR.—In the matter brought before me upon the construction of this will, two questions were involved, both depending on the same principle. The first, as to the rule applicable to the ascertainment of the class of persons to take under a gift to children after the determination of a pre-

(a) 3 Atk. 524.

(b) Ibid. 619.

(c) 1 Ed. 465.

(d) 4 Rnm. 398.

(e) 4 Madd. 11, but see *Belk v. Slack*, 1 Keen, 238.

1847.—*Bouverie v. Bouverie*.

vious life estate. The second, as to the rule applicable to the construction of provisions for survivorship annexed to such gifts. In both, the court adopts the rule of including as many objects of the gift as possible, consistently with the declared purpose of the testator. If the instrument is equivocally expressed so as to leave in a degree uncertain the period at which, or the contingency upon which, the shares are to vest, the court leans strongly towards the construction which gives a vested interest to the child, when that child stands in need of a provision: usually as to sons at the age of twenty-one; and as to daughters, at that age or marriage. That is the language in which the doctrine is stated by Sir W. Grant in *Howgrave v. Cartier*,^(a) and there are many other cases in which the same principle is laid down.

Looking then at this will, and taking that rule for our guide, what do we find? The first part of the clause in which the property is given, is this: "I give to my daughter the interest of all I have in the stocks for her sole use, and at her death I give the stock to her children, to be equally divided between them." Now, stopping there, we have a vested interest in all the children living at the testator's death, or who might come into esse before the period of distribution; and the words which immediately follow,—“together with the interest to be laid out for their use in case their mother *dies before [*252] they arrive at the age of twenty-one,”—appear to me to be introduced, merely to provide for the contingency of some of those children being under twenty-one at their mother's death, and therefore not in a situation to receive their shares, and not for the purpose of interfering with the generality of the prior gift, or with the class of the objects to take under it.

The only remaining question, therefore, depends upon the gift over. "In case one dies, &c." It was upon that clause that the argument chiefly turned, and though it certainly is an imperfect sentence, I think its meaning is sufficiently elucidated by what immediately precedes and follows. It is obviously impossible to construe it without either putting a forced construction

...
(a) 3 V. & B. 79.

on the words used, or introducing other words to explain them. For the words, "in case one dies," must necessarily refer to some particular period, at which the death is to take place; and as that period is not expressed, it must be ascertained from the context. Now, the last words of the preceding sentence are, "in case their mother dies before they arrive at the age of twenty-one;" showing, therefore, that the idea of the minority of the children was present to the testator's mind, and rendering it not improbable, that when, immediately after, he refers to the contingency of their dying, he means dying under twenty-one: for the sentence which follows is not merely, that in case one die, the others are to have share and share alike, but "should they all die before the age of twenty-one, then I give the said stock to other persons." Is not the meaning of that—If all die before twenty-one, I give it over to other persons; but if only some of them die, leaving a survivor or survivors at twenty-one, then I give it to the survivors? The frame of the whole sentence seems to me to show that when the testator speaks of [*353] children dying, he means *dying under that age, the attainment of which he meant to be the period at which their interest should be vested and indefeasible.

That construction is rendered still more probable by the circumstance that, according to the other, if there had been but one child who attained twenty-one, and that child had died in the lifetime of the mother, there would have been an intestacy. And there would also be the possibility of children who attained twenty-one, and who were therefore in a situation to require their portions, being entirely deprived of those portions after they had once vested, in order that the property might go to those who survived the mother.

There are much stronger cases than this of the application of the rule of construction to which I have referred. For, here, there is immediately preceding the clause in question, an express reference to the contingency of the children not attaining twenty-one; whereas in *Lord Salisbury v. Lambe*, no age was mentioned, except in the ultimate gift over, and there was nothing in the collocation of the sentences to enable the court to say that the words importing survivorship referred to survi-

 1847.—*Bouverie v. Bouverie*.

vorship between the children themselves ; and yet Lord Henley said, the shares vested in the children who attained twenty-one, though they died in the lifetime of their mother, and that the rule of construction in such cases had been settled over and over again, and entirely to his satisfaction.

On the authority of that case, which is only one among many in which the same rule has been adopted, I think the decision of the Vice-Chancellor upon this will is erroneous, and that the decree must be reversed.

 *BLAIR v. BROMLEY.

[*354]

1847 : June 26, 30 ; July 3.

A. and B. having for many years been partners in business as solicitors, dissolved their partnership in 1834, and the business continued to be carried on by A. alone, until 1841, when he became bankrupt, and it was then discovered that a sum of money which had been paid by a client into the joint account of the firm at their banker's in 1829, for the purpose of investment, and which A. had shortly afterwards represented to have been invested accordingly, and on which he had regularly paid interest on that footing, had, instead of being invested, been appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money.

Held, 1st. that, even assuming the defendant to have been (as he alleged he was) personally ignorant, of the whole transaction, and to have derived no benefit from the fraud, still he was bound by the representation of his partner ; such representation relating to a matter within the limits of the partnership business, and amounting therefore to a guarantee by the firm to the parties concerned, that they should be placed in the same situation as if the fact represented were true.

2d. That, although the plaintiff might have a right of action at law for the money, he had also a concurrent remedy, on the ground of fraud, in equity.

3d. That in equity the effect of the misrepresentation, so far as regarded the Statute of Limitations was the same as if it had been made on the day the fraud was discovered, notwithstanding the partnership had been dissolved more than six years before.

In the year 1820, William Bromley, who had for many years previously carried on business as an attorney and solicitor at Gray's Inn, took his brother, the defendant Joseph Walter Bromley, into partnership with him, the terms of the partnership be-

1847.—Blair v. Bromley.

ing that the latter should advance £1000, which was to be repaid to him at the expiration of five years, during which he was to be paid a salary as clerk in lieu of a share of profits; and that from and after that time he should be interested in one-third of the profits and losses of the concern as a partner. That arrangement was acted upon in all respects, and an account which William Bromley then kept with Messrs. Rogers, Twogood and Co., bankers in London, and in which there was a considerable balance standing to his credit, was transferred into the joint names of the two brothers. In the apportionment of the business between the partners, the agency business was undertaken by Joseph Walter Bromley, while his brother reserved to himself the exclusive management of the concerns of [“355] those individual clients whom he then had or might afterwards procure by means of his personal connection.

Among other clients of that description was one Thomas Blair, who died in 1828; after which, the plaintiffs, who were his executors, continued in that character to employ the Messrs. Bromley as their solicitors in all matters connected with the trust, and amongst others, in the investment of moneys belonging to the estate, the income of which was given by the testator to his widow for her life. In the year 1829, having been informed by William Bromley that he had an opportunity of investing a sum of £4500 as mortgage of an estate of a Mr. Seabrook, the plaintiffs who resided at Bath, drew a check for that amount on the executor's account at the bank of England, crossed with the names of Messrs. Rogers, Twogood and Co., and made payable to Seabrook or bearer, and enclosed the same in a letter to William Bromley, with instructions to invest the amount on the proposed mortgage. The cheque was duly presented by Messrs. Rogers and Co., and the amount was received and placed by them to the credit of the account, at their bank, of the Messrs. Bromley. The mortgage transaction went on between William Bromley and Mr. Seabrook, and was on the point of being completed, when it was broken off by the latter, and the money was never invested. William Bromley, however, not only concealed that fact from the plaintiffs and Mrs. Blair, but in several accounts, which he rendered to them from time to time

at their request, of the investments he had made for them, he included this sum of £4500 as invested on Seabrook's mortgage; and in the sums which he from time to time transmitted to Mrs. Blair as interest on the investments which he had been employed to make, he regularly *included the amount of [*356] interest at 5 per cent. upon the £4500 as if it had been actually invested.

In the year 1834 the partnership between the Messrs. Bromley was dissolved by mutual consent; the accounts between them were settled; and the balance then standing to the joint account with Messrs. Rogers & Co. was transferred to the separate account of William Bromley, who continued to carry on his business upon the same premises, and to act as solicitor for the plaintiffs, and the Blair family in the same manner as before, except that in the subsequent communications with him the name of the partnership firm was dropped. Mrs. Blair died in the year 1841, after which the payments of interest on the aggregate amount of the supposed investments fell into arrear; and in 1844 William Bromley became bankrupt, the non-investment of the £4500 was discovered, and this bill was filed against J. W. Bromley to make him liable for that sum, with the arrears of interest at 5 per cent.

The defence set up by the answer, and the truth of which, in point of fact, was satisfactorily established by the evidence, was, that no part of the sum in question had ever actually come to the hands of the defendant, and that he had never had any personal knowledge of the transaction, or any personal communication with the defendants, or any of the Blair family in reference to it, the whole of the business having been under the sole and exclusive management of William Bromley; for that, although some of the letters written by the plaintiffs in reference to such business were addressed on the outside to the Messrs. W. and J. W. Bromley, they were always opened by William Bromley, or if by accident they were opened by the defendant, they were immediately handed, without reading them, to William. In explanation of the defendant's ignorance of the fact *that the money had been carried to the credit [*357] of the joint account, the answer stated, (and the state-

1847.—*Blair v. Bromley*.

ment was confirmed by the evidence of William Bromley,) that although the balance of William Bromley's account at the commencement of the partnership had been transferred into the joint names for the convenience of business, and to enable the defendant to draw upon it for such sums as he might require for his branch of the business, yet the balance of that account was at all times during the partnership the exclusive property of William Bromley; the defendant's practice being, when he received any sum on account of the partnership, to pay into the nominal joint account only that portion of it which, in reference to the actual state of accounts between the partners, might belong to William Bromley, and a similar practice being observed by William Bromley himself; the consequence of which was, that the pass-book, relating to that account, was always kept and examined by William Bromley alone, and that the defendant never consulted it, except occasionally for the purpose of ascertaining whether some sum, which he had been advised by a client within his own department had been paid in for the purpose of completing some transaction, had, in fact, been paid in or not. Under these circumstances the defendant insisted that he was never under any liability to the plaintiffs for the demand in question; but that if he ever was, and if such liability did not determine with the partnership, the remedy for it was at law, and not in equity, and that, at all events, such remedy, whether at law or in equity, was bound by lapse of time and by the statutes of limitations, of which he expressly claimed the benefit.

The cause was heard before Vice-Chancellor *Wigram*, who made a decree in the terms of the prayer; and from that decision the defendant now appealed.

[*358] **Mr. Bethell, Mr. Wood, and Mr. Prendergast*, appeared for the plaintiffs.

Mr. Romilly, Mr. Bacon, and Mr. Craig for the defendants.

On the part of the plaintiffs it was contended that the receipt of the money and the placing it to the joint account, raised

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an implied contract on the part of the firm to invest it, pursuant to the instructions, on mortgage; and that the virtual misrepresentation subsequently made by William Bromley, being a fraud practised by him in relation to that partnership contract, was for all purposes of legal liability, as much imputable to the defendant as if he had been actually cognizant of and a party to it; and that, although the remedy at law was barred, because the statute in such cases began to run from the time when the breach of contract was committed, it was not so in this court, which had a concurrent jurisdiction on the ground of fraud, and where, the statutory rule being adopted only by analogy, time did not begin to run until the fraud was discovered.

On the other hand, it was contended, first, that, though the *contract* was originally binding upon the defendant as a partner, the *fraud* of his co-partner was not; and a distinction was attempted to be drawn between a fraud by which the partnership was enriched, and one by which no one was a gainer but the individual partner who, unknown to the rest, committed it. Secondly, it was said that the rule of this court, which, in its adoption of the statutory period of limitation, allowed it, in a case of fraud, to be reckoned from the discovery of the fraud, was applicable only as against the party morally guilty; and that it was contrary to the principles of a court of equity, which were founded on a high and pure morality, to take from an innocent party any defence which the law allowed him [*359] for protecting himself against liability resulting only from the operation of law, and not from any personal act of his own.

To this it was replied, that the rules of law and equity as to the mutual responsibility of partners for each others' acts and defaults were the same; and that there was a fallacy in assuming, as the foundation of an argument, the innocence, in a legal sense, of a party, whom, for all purposes of civil liability, law as well as equity treated as equally guilty with the actual perpetrator of the fraud.

THE LORD CHANCELLOR.—In this case the payment of the £4500 into the funds of William Bromley and his partner, for

1847.—*Blair v. Bromley*.

the purpose of investment, is proved, and their liability admitted. Afterwards, Mr. Bromley, one of the partners, representing that it had been invested, paid sums equal to the interest, and made a charge in a bill of costs for some of the expenses incident to such investment.

Whether the defendant knew of the transaction or not, he certainly had the means of knowing it. But neither is necessary; for the duty of laying out the money was in the ordinary course of the business of the firm; and they had undertaken it; and in that case I agree with what is laid down by the Master of the Rolls in *Sadler v. Lee*,^(a) that all the partners became liable for the several acts of each. In *Sadler v. Lee* the act consisted of abusing the power which the owner of the fund had conferred upon the several members of the firm by [*360] his power of attorney. In this case "the act consists in representing that the £4500 had been invested on the security; but in *Bate v. Scales*,^(a) where a similar misrepresentation had been made by a trustee, who ought to have invested money in stock, Sir William Grant "considered the case of a representation that the stock did exist, as precisely a parallel case to the actual existence of the fund in stock upon that day, which stock was sold out?" In the present case, the misrepresentation continued until the fraud was discovered: the case, therefore, according to Sir W. Grant, is the same as if on that day the fund, having been previously invested, had been called in and received by Messrs. Bromley, in which case there could not have been any question as to the statute of limitations.

Those who, having a duty to perform, represent to those who are interested in the performance of it that it has been performed, make themselves responsible for all the consequences of the non-performance; *Brown v. Southouse*,^(b) which was the case of an agent; *Evans v. Bicknell*,^(c) where Lord Eldon lays down the rule generally. In *Barwell v. Parker*, Lord Hardwicke applied the rule to the case of a scrivener who had undertaken to lay out money. The principle, indeed, is deeply rooted in our equitable jurisdiction, as in *Middleton v. Middleton*,^(d) and *Lut-*

(a) 6 Beav. 330.

(b) 12 Ves. 402.

(c) 3 Bro. C. C. 107.

(d) 6 Ves. 182.

(e) 1 Jac. & W. 96.

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trei v. Olmius, referred to by Lord Eldon in *Mestaer v. Gillespie*.^(a)

What, then, is the nature of the liability which so arises from the misrepresentation? Merely a guarantee that the parties whose interest might be affected by the misrepresentation shall be placed in the same situation as if the fact represented were true. The misrepresentation *was probably made [*361] for a fraudulent purpose; but the consequence is a merely civil liability; and as one partner may certainly bind another to any matter within the limits of their joint business, so he may by an act which, though not constituting a contract by itself, is in equity considered as having all the consequences of one.

I am, therefore, of opinion that William Bromley's partner, though he had no knowledge, or means of knowledge of his misrepresentation, would have been affected by this equity arising from it, and that time did not begin to run against the plaintiff's right until the discovery of the fraud.

What I have already said, and the cases to which I have referred, make it unnecessary to say much upon the objection that the plaintiff's remedy, if any, is at law. In all these cases the effect of the misrepresentation raises an equity to restore the parties deceived as nearly as possible to the situation, in which, but for the misrepresentation, they would have stood, and for which damages in an action might be a very inadequate remedy: and it is no objection to this equity that the facts may also support an action. It is more than 120 years since a similar objection was made in *Colt v. Woollaston*,^(b) and overruled.

I am, therefore, of opinion that the decree of the Vice-Chancellor Wigram must be affirmed with costs.

*COOPER v. EWART.

[*362]

1847: Aug. 5.

Under the common order for taxation of a solicitor's bill, it is the duty of the Taxing

(a) 11 Ves. 638.

(b) 2 P. Wms. 156.

1847.—Cooper v. Ewart.

Master, for the purpose of ascertaining whether the bill has been paid, to inquire what sums have come to the hands of the solicitor applicable to such payment; and that description includes all sums received by him in his character of solicitor.

Messrs. COOPER and BROOKS having been employed for several years as the solicitors of the executors and trustees under the will of the Rev. Edward Cooper in several suits, and a variety of other transactions connected with the testator's estate, and having delivered several bills of costs, the executors and trustees, in the year 1838, obtained the common order at the Rolls for taxation of the bills, with the usual directions that, upon payment by them of what should be found due to the solicitors, on such taxation, or in case the bills should appear to be already paid, the solicitors should deliver to them, &c., all deeds, &c., and if the solicitors should appear to have been overpaid, that they should refund and repay to the petitioners what the Master should certify to be overpaid.

After the Master had taxed the bills under this order, Brooks was examined on interrogatories as to the moneys received by himself and his partner on account of the petitioners, for which the latter were entitled to credit against the bills of costs. In his examination he set forth, in two schedules, an account of the sums received and paid respectively by himself and his partner on account of the petitioners, during the period of their employment, and the result of which, if the whole of the two schedules were to be taken into the account, showed a balance of about £2300 due to the petitioners, after deducting the amount at which the bills had been taxed. Brooks, however, stated, that, with the exception of three of the sums mentioned to have been received, and for which he admitted that the petitioners [363] were entitled to credit against the bills of costs, he could not say, save as appeared from the schedule itself, whether the petitioners were so entitled or not. The petitioners, however, relying upon the schedules alone, insisted, before the Master, that the items contained in them were obviously so connected(a) with the transactions in respect of which the costs

(a) All the items in the schedule of receipts purported to be either sums received from the Accountant-general under orders in some suit or matter in which the solici-

1847.—*Cooper v. Ewart.*

were incurred, that they ought all to be taken into the account, and that the Master ought to certify that the solicitors had been overpaid by £2300. The Master, however, by his report, after certifying that he had taxed the costs at £3755, stated that, conceiving the account set out in the examination to be a general account between the parties, which he was not authorized by the order to take, he was unable to certify what, if any thing, was due from the petitioners to the solicitors, or whether the bills had been paid or overpaid, to any or what amount.

Upon a petition, in the nature of exceptions to that report, the Vice-Chancellor of England, before whom it was heard, referred it back to the Master to review his report, with a direction that, in acting upon the former order, he should have regard to the sums of money which were received by Messrs. Cooper and Brooks, or either of them, in the character of solicitors for the petitioners.

This was an appeal by the solicitors from that order; and the question was, whether the direction contained in it was consistent with the original order of taxation.

*Mr. *Cooper* and Mr. *Chandless*, for the appeal peti- [*364] tion, contended that the terms of the direction contained in the Vice-Chancellor's order would let in an account so extensive as would exceed the limits of the statutory jurisdiction: that it had long been settled that a general account could not be taken under an order for taxation of a solicitor's bill; *Anon.*(a); and that to entitle the client in such a proceeding to credit for moneys received by the solicitor on his account, it must at least be shown that there was an agreement or understanding between the parties that the moneys should be so appropriated; *Jones v. James.*(b) *In re Smith,*(c) *Russel v. Buchanan,*(d) in which last-mentioned case they observed that the Vice-Chancellor, in stating his own notion of the rule, had stated it correctly, and that the doctrine which he was reported to have afterwards

toss had been employed, or sums received from the testator's bankers, or from the receiver of his real estates.

(a) 2 Vez. 452.

(b) 1 Beav. 307.

(c) 4 Beav. 309, and 9 Beav. 182.

(d) 9 Sim. 167.

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laid down, as the result of his consultation with the Masters, was at variance with all the authorities.

Mr. *Roundell Palmer*, *contra*, commented on the cases cited for the appellants, and also referred to *Ex parte Aitken*.^(a)

Mr. *Cooper* in reply.

THE LORD CHANCELLOR.—The simple question in this case is, whether the taxing officer of the court has properly discharged his duty in obedience to the order originally made, and if not, whether the direction contained in the Vice-Chancellor's order, which is now the subject of appeal, prescribes to the officer a course of proceeding consistent with that duty.

[*365] *The order was obtained as of course, and is in the usual form, containing, amongst other things, a direction, that, in case the Master shall find the solicitors to have been overpaid, they shall refund. He is, therefore to inquire whether the bills have been overpaid. Now, I don't see how it is possible for him to ascertain that without an inquiry as to the sums which have come to the hands of the solicitors in that character, because there are sums which the solicitor would have a right to retain, until he was paid the amount of his bill; which, in other words, would be applicable to the payment of his bill, independently of any express agreement or appropriation. Suppose, for instance, a solicitor gets a sum of £500 out of court under an order: he has a right to retain it until his bill be paid: he has a right to pay himself with it, and it must be assumed that he does pay himself, because in doing so he only exercises a right which the law gives him. Talk of an understanding! Can there be a more distinct understanding than that a solicitor who receives money out of court by the authority of his client, is to be paid his bill before the client is to have the sum handed over to him. He may, no doubt, hand it over if he pleases; but that is at his own option. He has a right to retain the money in satisfaction of his costs. Then is the client first

(a) 4 B. & Ald. 47.

of all to be called upon to pay £100 on the bill of costs, and then get, if he can, his £500 out of the solicitor's hands? If a proposition so extraordinary were founded on an act of Parliament, or were the result of decisions of this court, I should be compelled, however reluctantly, to follow it. But I find no such proposition laid down any where. I find the court continually involved in difficulties, in saying what is or what is not to be taken into account in the exercise of its summary jurisdiction in these cases; but I find it nowhere laid down that money of the client coming to the hands of the solicitor in his character of solicitor, *are not to be matter of inquiry before [366] the client is called upon to pay the amount of his bill.

A variety of cases have been referred to. As to *Ex parte Aitkin*, I do not rely on it, because it appears to be not a case of taxation, but an application for the delivery up of papers on payment of the amount of the solicitor's lien upon them. The anonymous case in *Vezey* certainly contains the opinion of Lord Hardwicke upon the construction of the act: but it does not appear from the report what was the nature of the items in question; and the observation of Lord Hardwicke are so general that it is impossible to apply them with safety to the present case. In the cases of *Jones v. James* and *In re Smith* there are observations of the Master of the Rolls suggested by the particular circumstances of those cases, as to the difficulties which might arise in determining whether particular transactions between solicitor and client were or were not to be brought into the account: but in neither of those cases, if what is reported to have fallen from the Master of the Rolls be taken with reference to the particular subject matter before him, is there any expression of opinion inconsistent with the Vice-Chancellor's direction in the present case. On the contrary, in *Jones v. James* he used these very words: "For the purpose of ascertaining whether there had been any payment of the bills, it was proper for the Master to inquire whether the solicitor had in his hands money applicable to the payment of the bills, and which he had a right to retain for that purpose;" and that is no more than the Vice-Chancellor has directed in the present case.

With respect to the other case which has been cited, of *Russel*
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[*367] *v. Buchanan*, before the Vice-Chancellor *himself, it appears that, notwithstanding what he is represented to have stated as being his own private opinion of the limits of the Master's authority under orders of this kind, he was, after consultation with the Master, induced to go a great deal further than he has gone in the present order, and further than it is necessary for me to make any observation upon; for I have now only to consider the particular order which is the present subject of appeal: and confining myself to that, it is sufficient to say that, observing that the Master is required by the present order to ascertain whether the bills have been overpaid, I cannot understand how he is to do that without inquiring what sums of money the solicitors had received on behalf of their clients applicable to such payment; and considering the Vice-Chancellor's order as confined to that, I affirm it, and dismiss this appeal with costs.

In the Matter of EYRE.

1848: Feb. 17, 23.

A bill of costs incurred prior to the passing of the 5 & 6 Vict. c. 73., held to be within its operation, though none of the business included in it was business for which, before the stat., a bill would have been taxable.

A special agreement, which covers part only of the items of a bill of costs, does not prevent the Master from proceeding with its taxation, and, consequently, such a bill may be referred for taxation without a special order.

Whether the Master is bound by such partial agreements, or whether he has jurisdiction to decide upon their validity or propriety, *Quære*.

If the agreement goes to the whole bill, its validity must be determined before the bill can be referred for taxation; for, if valid, it precludes taxation. Whether that question can be decided upon petition, or whether it requires a bill to be filed, *Quære*.

CERTAIN persons being desirous of obtaining an act for the enclosure of some waste lands in Oxfordshire, and considering that the influence of Mr. Eyre, who was a country attorney, would be of use in procuring the consent of neighboring land-owners, a deed was executed, in October, 1841, between

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those parties of *the one part, and Eyre of the other [*368] part, by which he undertook to act as their attorney in the matter; and they covenanted, amongst other things, "to pay him for his services at the rate of three guineas a day in addition to the ordinary attorney's charges for travelling and other expenses."

On the termination of the business in which Mr. Eyre was so employed, which was prior to the passing of 5 & 6 Vict. c. 73, he delivered his bill of costs and charges to his clients, which not being paid, he brought an action against them for the amount upon the deed of October 1841, whereupon they obtained, *ex parte* at the Rolls, the common order for taxation. Mr. Eyre, on being served with that order, moved before the Master of the Rolls to discharge it for irregularity.

The motion, having been refused with costs, was now renewed by way of appeal before the Lord Chancellor.

Mr. *Rolt* and Mr. *Sheffield*, for the motion, made three points; 1st. Want of jurisdiction—contending that, although the act had been held to be retrospective for some purposes, it was not so as to bills previously delivered, for business which the act for the first time made taxable; 2nd. That, at all events, the existence of the special contract rendered it improper to obtain the order *ex parte Re Smith*;(a) 3d. That, whether that was so or not, the petition, on which the *ex parte* order was obtained, ought to have noticed the contract; and that the suppression of it was a good ground for discharging the order, as it was not for the party applying, but for the officer who gave out the order, to judge *whether the contract was material or not; [*369] *Wilkin v. Nainby*;(b) *Cooper v. Lewis*.(c)

Mr. *Bayley* (*absente* Mr. *Turner*,) as to the first point, relied on *Re Lees*;(d) *Re Wilton*;(e) *Binns v. Hay*;(f) and, as to second, on *Drax v. Scroope*;(g) in which it was held that contracts, like that in question as to the rate of remuneration of a

(a) 4 Beav. 309.

(b) 8 Beav. 465.

(c) 2 Phill. 178.

(d) 5 Beav. 410.

(e) 13 L. J. N. S. 17.

(f) *Ibid*, 28.

(g) 2 B. & Ad. 581.

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particular class of a solicitor's charges were not absolutely binding; and that, when they occurred, it was the Master's duty to exercise his judgment upon their propriety, and to adopt them in the taxation only so far as under all the circumstances of the case he thought right. He also referred to *ex parte Martin*.^(a)

Mr. *Rolt*, in reply, contended that the doctrine of *Drax v. Scroope* must be considered as being founded on the principle that such agreements were generally entered into with a view to evade taxation,—a principle which was not applicable in this case, inasmuch as, at the time when the contract was entered into, the business to which it referred was not business for which a bill was taxable.

On the conclusion of the argument,

THE LORD CHANCELLOR said, it was difficult to reconcile the rule established by *Drax v. Scroope*, where the agreement applied to part only of the bill, with the doctrine laid down [*370] by the Master of the Rolls, and *which he had approved, that an agreement which covered the whole bill, precluded taxation.

Feb. 23.—THE LORD CHANCELLOR.—I think the act is retrospective not only as to bills which were taxable before it came into operation, but as to bills which the act for the first time made taxable. The Master of the Rolls so decided in *Re Lees*, and I agree with that decision. I also think that the circumstance of there being a special agreement as to particular items in the bill, does not oust the jurisdiction under the act, or require any special directions to be inserted in the order; and therefore that there was no necessity for mentioning that circumstance to the officer, on applying for the order to tax the bill.

I was surprised to hear it stated during the argument, that I had said, in *Cooper v. Lewis*, that the suppression even of an immaterial fact was a ground for discharging an *ex parte* order. But, on referring to the report, which seems perfectly correct, I

(a) 4 Dowl. 18.

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find that I said directly the reverse; for on that point being raised I observed that if the facts were not material, they need not be stated in the petition ;(a) and it is obvious that if the rule was otherwise, there would be no limit to the irrelevant matter which parties would be obliged to introduce into such applications.

With respect to this case I find that the Masters do proceed with the taxation of bills referred to them, notwithstanding they may find a special agreement between the parties as to a particular class of items. I abstain *from expressing [371] any opinion on this occasion as to the effect which the Masters ought to give to such agreements, or whether they have or have not jurisdiction to decide upon their validity. In *Drax v. Scroop* Lord Tenterden seems to have thought they had, and that is the decision of a court of law; but I give no opinion upon that point. If either party should be dissatisfied with the mode in which the Master may deal with the agreement in this case, they will have an opportunity of raising the question for the consideration of the court. There are authorities that, where the agreement goes to the whole of the bill, the question as to the validity of the agreement must be raised and disposed of before the bill can be referred for taxation, It has been so decided by the Master of the Rolls, and I think correctly, on the ground that taxation means allowance according to the ordinary rate of the court: whereas an agreement, which covers the whole bill, if it be valid, is a special contract between the parties which precludes taxation altogether; and, therefore, in all such cases the validity of the agreement must be decided upon in the first instance. Whether the court has jurisdiction to do that on petition, or whether it requires a bill, I give no opinion.

It is sufficient in this case to say, that I find no agreement as to the right to tax; and that, as the agreement relative to particular items does not interfere with the Master's jurisdiction, it was not necessary to be stated to the officer when the order was applied for.

Motion refused with costs.

 1847—Robinson v. Wall.

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*ROBINSON v. WALL.

1847: July 8, 10.

Where property is advertised to be sold "without reserve," such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can, under any possible circumstances, affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser; and any evasion of that engagement on the part of the vendor, being a violation of his contract with the public, will disentitle him to the aid of a Court of Equity to enforce the sale.

Therefore, where, previously to a sale of a life-interest, which was advertised to be "without reserve," the vendor entered into a private agreement with another person, that the latter should bid a certain sum at the auction, and be the purchaser at that sum unless a higher sum were bid, a bill by the vendor for specific performance against a third party who had been declared the purchaser at the auction, though for a much higher price, was dismissed.

THE plaintiffs in this cause were the assignees of the late Sir Thomas Champneys, who took the benefit of the Insolvent Act in the year 1835. His wife, Lady Champneys, being tenant for life, in possession of large real estates under the will of the late Sir Roger Mostyn, the plaintiffs advertised the interest of Sir Thomas Champneys, in right of his wife, in those estates for sale by public auction, under certain conditions of sale, one of which was, that the sale was to be "without reserve." Among other bidders at the sale was Lord Mostyn, whose wife was the next tenant for life of the estates, under the same will. After numerous biddings the property was knocked down to the defendant Wall, as agent for the defendant Flight, for the sum of £49,800; and £5000 was paid down as a deposit. While the title was under investigation, Flight, having reason to suspect that Lord Mostyn had bid at the sale in pursuance of some understanding between him and the vendors, apprised the plaintiffs of his suspicions, and gave them notice that, if it should turn out that there had been puffing at the sale, he should not complete his contract. Before the title had been accepted and the contract completed, Sir Thomas Champneys died; whereupon Flight refused to complete, and brought an action against

[*373] the auctioneer for his deposit. "In consequence of which

 1847.—*Robinson v. Wall.*

this bill was filed for specific performance, and an injunction to restrain the action.

Flight's defence was, that there had been puffing at the sale, in support of which he filed a cross bill of discovery; and from the answer to that bill, it appeared that, previously to the sale, Lord Mostyn had been in treaty with the assignees and Lady Champneys for the purchase of the interest of both those parties for the life estate of Lady Champneys; but that the assignees being advised that they could not lawfully dispose of the interest of the insolvent otherwise than by public auction, an agreement had been come to, by which it was agreed that Lord Mostyn should attend at the auction and bid £35,000, and that, if there should be no higher bidding at the auction, the interest of the insolvent should be knocked down to him at that price, and that, in that case, he should also purchase the interest of Lady Champneys for an annuity of £600 per annum for her life; but if there should be any higher biddings, and Lord Mostyn should not be willing to bid higher, then the agreement should be void altogether.

Upon that answer coming in, the defendant Flight moved for, and obtained, leave to file a supplemental answer in the original suit for the purpose of putting the deeds, which had been executed in pursuance of that agreement in issue.

At the hearing of the cause before the Master of the Rolls the bill was dismissed with costs, and an order made for returning the deposit, which had been brought into court to the defendant.

The plaintiffs appealed from that decree.

*Mr. *Bethell* and Mr. *Chandless* appeared for the appellants. [*374]

Mr. *Stuart* and Mr. *Rogers* for the respondents, relied on *Meadows v. Tanner*.^(a)

July 10.—THE LORD CHANCELLOR.—The Master of the Rolls in this case was of opinion that the purchase by auction was

(a) 5 Madd. 34.

 1847.—*Robinson v. Wall*.

void as against the purchaser, and that the vendors could not enforce the contract against him, upon the ground of its not having been conducted upon terms consistent with the contract held out to the public by the particulars of sale, in which the sale professed to be without reserve.

Now, that a sale by auction, announced to be without reserve, where there has been a bidding on the part of the vendor for the purpose of keeping up the price, cannot be enforced against the purchaser, was decided by Sir John Leach in the case of *Meadows v. Tanner*. Although that was the only case referred to, and the only one that I am aware of in which this particular question has arisen and been decided, it depends in fact upon the same principle as that numerous class of cases in which questions have been raised as to the effect of employing puffers at a sale. They all turn upon this, whether the course pursued by the vendor is or is not in violation of the contract which he enters into with the public as to the mode in which he offers the property for sale; and, in any case in which it is clear that the course pursued has not been consistent with that contract, [*375] "a Court of Equity will treat the sale as contrary to good faith on the part of the vendor, and will refuse to enforce it.[1]"

There being, then, no doubt upon the law, the only question is whether that which took place in this case was or was not a violation of the contract proposed to the public, namely, that the property should be sold "without reserve." Now the term

[1] For American cases in regard to the illegality of employing puffers at a sale by auction, see *Moncrief v. Gouldsbrough*, 4 Harr. & M'Hen. 282; *Donaldson v. M'Roy*, 1 Browne, 346; *Smith v. Greenlee*, 2 Dev. 126; *Miller v. Campbell*, 3 Marsh. 526; *Morehead v. Hunt*, Dev. Equit. 35; *Wood v. Hall*, Ibid 411; see Editor's note b, to 3 Johnson's Cas. at p. 32. That a combination to prevent competition in sales by sheriffs at auction is contrary to morality and sound policy, and illegal, see *Troup v. Wood*, 4 John's Ch. R. 251; *Jones v. Carwell*, 3 John. Cases, 29, 529. The reason for holding such attempt to suppress biddings at auction are that they operate as a fraud upon the debtor and his remaining creditors, by depriving the former of the opportunity, which he ought to possess, of obtaining a full equivalent for the property which is devoted to the payment of his debts, and they open a door for oppressive speculation. See also *Doolin v. Ward*, 4 John. R. 194; *Wilber v. How*, 8 John. R. 444.

"without reserve," in that case before Sir John Leach, is defined by him to be an undertaking on the part of the vendor, that no person shall be employed by him to bid, for the express purpose of keeping up the price. That might be a sufficient definition for the purpose of the particular case then under consideration; but as a general definition it is imperfect, because it does not embrace all the cases to which the term "without reserve" equally applies. When a property is offered for sale without reserve, the meaning, and the only meaning that can be attached to it, is, that of the bidders—the public—who choose to attend the sale, whoever bids the highest shall be the purchaser; that the biddings shall be left to themselves, and that there shall be no bidding on the part of the vendor. And it is not without reserve, the biddings are not left free from the interference of the vendor, if any means or contrivance, it matters not what, be resorted to for the purpose of preventing the effect of open competition. I consider, therefore, the term "without reserve" to exclude any interference on the part of the vendor (or, which is the same thing, of those who come in under the vendor,) which can, under any possible circumstances affect the right of the highest bidder to have the property knocked down to him, and *that*, without reference to the amount to which that highest bidding shall go.

*Now, what took place in this case, although the arrangement is rather complicated, appears to me to amount to a reserve, or at least to precisely the same thing, so far as the public is concerned, which is the only way you can look at it. For it is quite immaterial what are the precise terms of the arrangement between the vendor and any other person that being only the machinery by which the effect is produced. We must look to see what is the effect of what took place as regards the public—as regards those who attended the sale. Now the result of the arrangement between the vendor and Lord Mostyn was, that there should not, in fact, be any sale by auction at all, unless the price exceeded £35,000. Therefore it was a mere mockery of a sale under that price. Any person going into the auction-room, and intending to bid for this property, had no chance whatever of purchasing it unless he went beyond

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£35,000. Now, whether the vendor instructed the auctioneer not to knock it down to any bidder under £35000—that is, to buy it in as it is called—or to knock it down to a person employed to bid for the vendor, or to a person with whom the vendor had contracted that he should have it at £35,000, and that no bidding under that amount should interfere with his contract, it is precisely the same thing so far as the public is concerned; for below that amount there is, in either case, no bidding which can have any effect.

What is held out to the public as being a sale without reserve turns out, therefore, to be not a sale without reserve, but a sale *with* a reserve; that is to say, subject to an arrangement which prevents the possibility of any one of the public purchasing the property unless it exceeds a certain amount; and I am of opinion, that if the sale be tainted with that vice at the [*377] *commencement, it will not be cured by the circumstance of there being eventually a bidding exceeding that amount.

That is consistent with the principle of all the cases, because such a result may have been produced by that very mode of proceeding. It may very possibly be, that if the property had been put up for sale, strictly speaking without reserve, leaving it entirely to the public to bid whatever they thought right, it never might have attained £35,000. If it attains £35,000, by reason of the arrangement between the vendor and those with whom he is dealing, then the circumstance of a person bidding higher cannot bind the party who was not bound when he came into the auction-room and began to bid.

It appears to me, therefore, that the decree of the Master of the Rolls is right; and the appeal must be dismissed with costs.

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*SHORE v. SHORE.

1847: Nov. 3.

After the death of the obligor in a bond, his executor and devisee in trust under his will, by which he had charged his real estates with payment of his debts, gave a

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new bond in his own name for the same amount to the obligee, who thereupon delivered up the original bond and signed an endorsement thereon, stating that he had accepted a new bond "in lieu of" it. The obligor in the new bond having afterwards become bankrupt, Held, in a creditor's suit for administration of the testator's estate, that the obligee had no right of proof upon the original bond.

THIS was an appeal petition, in a creditor's suit for the administration of the estate of Samuel Shore, deceased; praying, that the Master might be directed to receive a proof tendered by the petitioners upon a bond for £2000, which had been rejected by the Master, and whose decision had been confirmed by the Vice-Chancellor of England.

The bond was given in July, 1826, by Samuel Shore to W. A. Smith. Samuel Shore died in November, 1836, leaving Offley Shore, his only son, whom he appointed sole executor of his will; and to whom jointly with another person, who did not act, he devised his real estates, subject to the payment of his debts, in trust for Offley Shore for life, with remainder to other parties. Interest was duly paid upon the bond, down to the death of W. A. Smith, which happened in June, 1838; shortly after which the petitioner Edward Smith, who, under an arrangement made by W. A. Smith, of his property shortly before his death, had become beneficially entitled to the bond, gave it up to Offley Shore, and took another bond for the same amount in Offley Shore's own name, and he at the same time signed the following endorsement upon the old bond. "I hereby acknowledge and declare that I have this day accepted a bond from Offley Shore, Esq., for the sum of £2000, the within principal sum, and in lieu of the within written bond." Offley Shore continued after that transaction to pay the interest, entering the payments, as he had done before, in his accounts with his father's estate, until the year 1843, when he became bankrupt; and Edward Smith, being apprehensive that his estate *would [*379] turn out insolvent, tendered the proof in question upon the original bond, jointly with the executrix of W. A. Smith, who was the other petitioner; alleging, what was admitted on all hands in the argument, that the reason for substituting the new bond for the old one, was a mistaken notion, on the part both of himself and Offley Shore, that his remedy on the old bond would

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otherwise have been liable to be barred by the Statute of Limitations.

Mr. *James Parker*, and Mr. *Bagshawe*, for the petitioner, argued first upon the intention of the parties, to be inferred from the circumstances of the case and the great improbability that the petitioner should have designedly surrendered his security upon a real estate which, they said, was worth many thousands a year after payment of all charges, in exchange for the personal security of a party who was only equitable tenant for life of that estate; and they relied on *Hardwick v. Mynd*,^(a) *Saunders v. Leslie*,^(b) *Teed v. Carruthers*,^(c) *Lee v. Lockhart*,^(d) and on the cases between vendor and purchaser, in which it had been held that a vendor did not lose his lien on the estate by taking a bond or other collateral security from the purchaser, for the purchase money. But they further contended that, independently of such inference of intention, the petitioner had an equitable right to the benefit of the original bond: for it was clear that the bond, which had been studiously kept on foot by Offley Shore against his father's estate, was a subsisting legal obligation upon that estate for the benefit of somebody; and as Offley Shore's assignees, supposing them to have the primary right to enforce it, could only recover upon it the amount of the dividend which his estate might eventually *pay [*380] to the petitioner upon the substituted bond, the balance, if it did not belong to the petitioner, would be a gratuitous benefit to the testator's estate, which a Court of Equity would not allow that estate to retain to the prejudice of the petitioner, whose claim was supported by a valuable consideration. In support of the proposition that the original bond was still enforceable at law, they were proceeding to cite authorities; but

THE LORD CHANCELLOR said, You need not cite authorities for that; for the case does not turn upon it: if it did, I should not take upon myself to decide it.

(a) 1 Anstr. 111.

(c) 2 Y. & C. C. C. 31.

(b) 2 Ball & B. 509.

(d) 3 My. & Cr. 309.

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Mr. Bigge appeared for the assignees of *Offley Shore*, but declined to take any part in the argument, stating that he conceived his clients had no interest in the question; for if the petitioner succeeded in his proof, the bankrupt's estate would be relieved from all liability; while, on the other hand, if he failed, the bankrupt's estate would be entitled to recover from the testator's estate, upon the original bond, that amount (and no more) which the petitioner might receive in the form of dividends upon the new bond.

Mr. Daniel appeared for the parties entitled, in remainder, to the testator's real estates; who were the only parties interested in contesting the proof, there being no personal estate. He contended, that the effect of the exchange of the bonds was an absolute discharge of the testator's estate from all claim, at least by the petitioner.

Mr. Parker in reply.

THE LORD CHANCELLOR.—I have heard nothing to raise any doubt in my mind of the correctness of the decision of the court below. It is quite immaterial whether the [*381] executor of the obligee can or cannot bring an action on the bond, if there has been such a dealing between the beneficial owner of the money secured by it, and the parties liable to pay it, as disentitles the former to claim the money; for there can be no doubt that a party, having a security for a debt, and, by an arrangement with his debtor, taking another, with an express agreement that it shall be in lieu of the first, is precluded from afterwards resorting to that which he has so given up.

It being clear, therefore, that a party may, by contract, part with his right upon an original security, the only question here is, whether that is what the petitioner has done. It is not at all the question whether, indirectly, at the suit of some other parties, there may be a right of proof: the sole question is whether, after what has taken place, this petitioner has a right of proof. And I am clearly of opinion that he has not. The case in *Ball and Beatty* does not touch the question, for the principle of that

1847.—*Shore v. Shore.*

decision is, that it lies on the party against whom the claim is made, to show that the other party, in taking a new security, intended to release the original one; in other words, to show that the one was taken in lieu of the other. Here the petitioner not only signed a memorandum in those very words, but delivered up the original bond. It is clear that he cannot be entitled to both securities; and, if only to one, it is to the one which he took and not to that which he gave up.

Appeal dismissed with costs.

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*WOOD v. ROWCLIFFE.

1847: Nov. 2, 3.

The jurisdiction to protect by injunction the possession, and to decree the delivery up, of specific chattels, is not confined to chattels, the loss or injury of which would not be adequately compensated by damages, but extends to all cases in which the party in possession of the chattels has acquired such possession, through an alleged abuse of power on the part of one standing in a fiduciary relation to the plaintiff.

Where a bill is retained at the hearing with liberty to the plaintiff to bring an action, the order ought to go on to direct that in case the action be not brought within a certain time, the bill shall stand dismissed.

THE principal object of this suit was to restrain the sale of certain furniture by the defendant Rowcliffe, and to have it delivered up to the plaintiff as the rightful owner.

Rowcliffe claimed the furniture under a bill of sale, by way of mortgage, from the defendant Elizabeth Wright, who was, at the time, in possession of it as apparent owner, but who, as the plaintiff alleged, had no property in it, having been left in charge of it merely as his agent during his absence abroad. The bill represented that the furniture was still in the hands of Elizabeth Wright, and that Rowcliffe had advertised it for sale. His answer, however, stated, and it was proved, that he had taken possession of it soon after the execution of the bill of sale, and that he had ever since retained such possession by keeping a man in the house where it was, although Elizabeth Wright, who resided there, was allowed the use of it.

1847.—Wood v. Rowcliffe.

Elizabeth Wright, by her answer, disclaimed all interest in the furniture.

At the hearing of the cause before Vice-Chancellor Wigram, by whom an injunction had been previously granted, a decree was made, by which it was ordered, among other things, that the bill should be retained, with liberty to the plaintiff to bring an action of trover for the furniture, and the defendant was, on the trial, to admit conversion.

On the hearing of an appeal by Rowcliffe from that decree, the following two points, amongst others, *were [383] made by the counsel for the appellant. First, that the plaintiff's remedy was at law, and that a bill in equity did not lie to restrain the sale of specific chattels, unless they possessed some peculiar value which could not be compensated by damages, as in the case of the *Pusey horn*.(a) Secondly, that admitting such a bill would have lain, had the goods been still in the possession of Elizabeth Wright as the plaintiff's agent for their custody; yet, at all events, the equity was gone as soon as they had changed hands, and passed into the possession of a stranger. And in support of this they referred to the doubt, expressed by the Vice-Chancellor himself in overruling a demurrer to this very bill, as to whether his decision would have been the same if the bill had alleged that the goods were in the hands of Rowcliffe.

In reference to these points

THE LORD CHANCELLOR said—The cases which have been referred to, are not the only class of cases in which this court will entertain a suit for delivery up of specific chattels. For, where a fiduciary relation subsists between the parties, whether it be the case of an agent or a trustee, or a broker, or whether the subject matter be stock, or cargoes, or chattels of whatever description, the court will interfere to prevent a sale, either by the party entrusted with the goods, or by a person claiming under him, through an alleged abuse of power. In this case there is great reason to believe that Elizabeth Wright never had any

(a) 1 Vern. 272.

 1847.—Wood v. Rowcliffe.

right to the goods except as the plaintiff's agent, for she has disclaimed all interest in them by her answer, and there is nothing to show how she had acquired any property in them. But, says Rowcliffe, I purchased under circumstances which give [*384] me a legal right to the goods. If that be *so, the equity of the plaintiff will be intercepted by a prior legal right. In such a case this court begins by putting the matter into a course of investigation to ascertain that legal right. That is what the Vice-Chancellor has done. And in that respect I see no ground for impeaching the decree.

[His Lordship then proceeded to comment on some subordinate parts of the case, in the course of which he made the following observation.] I observe the decree gives the plaintiff liberty to bring an action, but gives no directions as to what is to be done if he does not proceed, whereas it ought to have directed, that if he did not proceed within a certain time the bill should be dismissed.

Mr. Parker and *Mr. H. Clarke*, were for the appellant.

Mr. Romilly and *Mr. Southgate*, for the respondent.

 GROOM v. STINTON.

1847: Nov. 2, 3.

To prevent the enrolment of a decree, the order for setting down the cause to be reheard must be actually served, and notice of its having been made is not sufficient.

THE decree in this cause having been duly passed and entered, the docquet was left for signature on the 7th of July, 1847, and notice thereof was on the same day given to the defendant's solicitor, by whom a *caveat* had been previously entered; the effect of which was to stay the signature for twenty-eight clear days. No step was taken by the defendant until the 2d of August, being the 26th day, when he left a petition of appeal with the Lord Chancellor's secretary, by whom it was answered

1847.—Groom v. Stinton.

on the same day : on the 3d of August he obtained the petition so answered from the secretary, and, on the 4th, he left it, together with the usual *undertaking as to costs, with [*385] the registrar, with a request that the order for setting it down might be given out on the following day ; and at 9 o'clock on the morning of 5th of August, he gave notice to the plaintiff's solicitor that the order had been made on the 2d, and that the other steps before-mentioned had been taken. The order was drawn up and served upon the defendant's solicitor at noon of the same day ; but, in the mean time, the docquet had been signed and the decree enrolled.

Mr. Rolt and Mr. Terrell now moved on behalf of the defendant, to vacate the enrolment for irregularity, contending, on the authority of *Robinson v. Newdick*,^(a) that the presentation of the petition within the twenty-eight days was sufficient to prevent enrolment ; and that it was not necessary, for that purpose, that the order for setting the cause down should be actually served : but that, at all events, the existence of the order, and notice of its having been made was equivalent to service, as had been often decided in the case of injunctions.

Mr. *Js. Parker* and Mr. *Amphlett*, *contra*, relied on *Dearman v. Wych*,^(b) *Barnes v. Wilson*,^(c) and *Stevens v. Guppy*,^(d) as showing that, in order to prevent enrolment, it was necessary that the order should be actually served : observing that, until that was done, the opposite party had no power to compel the appellant to pay the costs and fulfil the other conditions which it prescribed ; with respect to *Robinson v. Newdick*, they observed that the expression of Lord Eldon was too loose to be relied on, the point now in question not being the ground of the decision ; but that, on the contrary, if the *doctrine [*386] now contended for on the other side were correct, the other points which were discussed and decided in that case would not have arisen. They also referred to *Wardle v. Car-*

^(a) 3 Meri. 13.^(b) 4 My. & Cr. 550.^(c) 1 R. & M. 486.^(d) T. & R. 178.

1847.—*Groom v. Stinton*.

ter, (a) as showing that the question was one of strict practice, which was not to be relaxed on considerations of indulgence.

Mr. *Rolt*, in reply, attempted to distinguish this case from *Dearman v. Wych*, on the ground that, in the latter, there was no *caveat*.

On the conclusion of the argument,

THE LORD CHANCELLOR said :—With respect to the notice which is relied on, it is merely notice that service would be made at a future time ; and, therefore, if actual service be necessary, it cannot be equivalent to such service. On that point, if the case I decided in *Mylne & Craig* is inconsistent with the case before Lord Eldon, of course I cannot dispose of this without examining those two cases. The only effect of a *caveat* is to postpone the period at which the enrolment may be made : that circumstance, therefore, is of no consequence with reference to the question now raised.

Nov. 3.—THE LORD CHANCELLOR.—I have looked at the cases cited yesterday, and they seem to leave no doubt on the question raised by this motion.

The first was *Robinson v. Newdick* in 1817, in which [*387] three points were made. One of them had some *reference to the present case ; the other two were free from all doubt. And Lord Eldon's decision on the two last would stand good whatever his opinion had been on the first. It is true the reporter makes him say "on all the grounds ;" but as the two last would have superseded the necessity of his deciding the first, he cannot be supposed to have exercised a judicial mind upon the latter.

But whatever opinion he might then have entertained in *Stevens v. Guppy* the point was raised directly, and decided on a ground quite inconsistent with what is attributed to him in *Robinson v. Newdick*. For, if what is there attributed to him be correct, the enrolment in *Stevens v. Guppy* would have been

1847.—*Groom v. Stinton.*

irregular independently of any other circumstances ; but he assumed the enrolment to be regular, and set it aside on the ground of conduct. That case, therefore, is an express decision that to prevent a valid enrolment being made the order for rehearing must be not only signed but served.

In the case in *Mylne & Craig*, I reviewed all these cases, and came to the decision which is there reported. The party now moving has certainly a right to call upon me to review that decision, but he has not satisfied me that I came to a wrong conclusion. Therefore this motion must be refused with costs.

**AMES v. PARKINSON.*

[*388]

1847: Nov. 3.

The committee of a lunatic is personally responsible in that character to no jurisdiction but the Great Seal. And, therefore, where a committee had neglected to comply with an order in lunacy, authorizing him to make certain payments out of the lunatic's estate, in discharge of a liability which had been established against the lunatic in a suit at the Rolls ; an order pronounced by the Master of the Rolls on a petition in the cause, that the payments be made "by the lunatic or the committee" on or before a given day, was discharged, on the ground that the application ought to have been made in the lunacy, and that the Master of the Rolls had no jurisdiction to entertain it.

THIS was a suit against a trustee who had become a lunatic, and against the committee of his estate, for the purpose of having a portion of the trust fund made good, which had been lost in consequence of a breach of trust committed previously to the commencement of the lunacy.

By the decree made at the Rolls on the 7th of June 1844.(a) it was amongst other things declared, that a certain sum of stock, the amount of the default, ought to be purchased and transferred to the credit of the cause out of the lunatic's estate and effects, and that certain other sums in respect of past dividends, together with the costs of the suit, ought to be paid out of the same estate. And it was ordered that the defendant, the

(a) See 7 Beav. 379.

1847.—Ames v. Parkinson.

committee, should apply to the Lord Chancellor in lunacy for an order for such purchase, transfer, and payments.

A petition was accordingly presented by the committee in the lunacy, upon which it was ordered, that certain stock standing to the account of the lunacy should be transferred to the credit of the cause: and that the further sums necessary for performing the decree should be raised by the committee by sale of certain shares, and of a bond forming part of the lunatic's estate, and that out of the amount when raised a certain [*389] sum should be paid into court to the credit of the cause, a certain other sum to the tenant for life of the trust fund, and a certain other sum to the plaintiffs in respect of the costs of suit.

In pursuance of that order the principal sum of stock was replaced, but the other payments directed by the order not having been made, the plaintiffs, in July 1846, presented a petition at the Rolls, praying immediate payment by the lunatic or his committee, and an order was made by the Master of the Rolls in those terms, fixing the 6th of November as the day of payment.

This was an appeal petition by the committee to discharge that order.

Mr. *Js. Parker* and Mr. *Adams* for the petition.

Mr. *Tinney* and Mr. *Busk*, *contra*, contended that as the order merely went to compel the committee to perform what the order in lunacy had directed, he had no reason to complain of it.

THE LORD CHANCELLOR.—This application ought to have been made in the lunacy. The Master of the Rolls had no authority to interfere, and I cannot but think he must have made the order inadvertently: for it does not follow up the decree. The decree was quite correct: it declared the right, and prescribed the mode of carrying it into effect by an application to the Great Seal. But this order departs from that scheme, and orders the committee personally to make payment. The committee, however, is not personally liable for the debts of the lu-

 1847.—*Ames v. Parkinson.*

natic: nor is he responsible in that character to any jurisdiction but *the Great Seal. This is either the case [*390] of the Master of the Rolls assuming to exercise jurisdiction in lunacy, or it is an order on the committees personally by another jurisdiction. I do not think the Master of the Rolls would have made such an order if his attention had been called to it. But I can only deal with the order as I find it. The order must be discharged, but it will be understood that I do not discharge it because I am of opinion that the payments ought not to be made, but simply because the application was made to the wrong jurisdiction.

SCOTT v. PASCALL.

AND

PASCALL v. SCOTT.

1847: Nov. 11.

Where a suit is instituted by some of a class of persons on behalf of all, those individuals of the class only who are actually named as parties to the record, are responsible to the defendants for costs.

And, therefore, in a suit by some on behalf of all of the guardians of the poor of a parish against a party alleged to be a defaulter to the parish funds, Held, that a person who had been a guardian at the commencement of the suit, and one of the committee of guardians who authorized it, but was not actually named as a party to the record, was a competent witness for the plaintiffs, notwithstanding his liability, as between himself and the other guardians, to contribute to the costs of the suit; such liability being one which could not be enforced in that suit, and his incompetency, by reason of interest as a rate payer, being removed by the statute 3 & 4 Vict. c. 26.

A CHARGE having been made against the plaintiff Scott, that he had misappropriated large sums of the funds of the parish of Clerkenwell, while serving a parochial office, he, in October 1837, executed a mortgage of his real estates for securing the payment of £10,000 to Pascall and Adams, two of the then guardians of the poor of the parish in trust for the purposes to which the poor rates were applicable.

In the following year, he instituted the first of these suits

[*391] *to set aside the deed, as having been obtained under duress, and Pascal and Adams instituted a cross suit on behalf of themselves, and all the other guardians of the poor of the parish to enforce the trusts of the deed.

On the hearing of the suits it was decreed that the deed should stand as a security for what, if any thing, should appear to have been the real amount of the debt due from Scott to the parish in October, 1837, with interest, and an account was directed accordingly.

In taking the account before the Master, one Scargill who was called as a witness by the plaintiffs in the cross suit, was objected to by the defendant on the ground of interest. On his examination on the *voir dire*, it appeared that at the time of the institution of the suit he was a guardian, and one of a committee of seven members of the body to whom the proceedings against Scott had been entrusted, and by whose direction the cross suit had been instituted: but that he ceased to be a guardian in 1841, when the solicitor, who had, up to that time, conducted the suit, was discharged and paid his bill. It further appeared that Pascall and Adams had since executed a release to the witness of all liability for the costs of the suit generally. The Master, nevertheless, held the witness incompetent, and rejected his evidence, but the Vice-Chancellor of England having, on appeal, reversed that decision and directed the Master to receive the evidence; a motion was now made before the Lord Chancellor on behalf of Scott to discharge his honor's order.

Mr. *Stuart*, Mr. *Parry* and Mr. *Daniel*, for the motion.

[*392] *The case is not affected by Lord Denman's act, as that act does not apply to suits then pending; and though the act of 3 & 4 Vict. c. 26, contains no such restriction, it only removes the incompetency of parish officers in respect of their liability to the payment of rates, whereas Scargill is liable for the costs of this suit, not merely as a rate-payer, but as guardian; and that in two ways; for, first, if the suit should fail, the authors and advisers of it may be liable to make good to the parish funds the costs incurred in it, as having been improvidently instituted.

1847.—*Scott v. Pascall*.

[THE LORD CHANCELLOR.—That is a liability which, if it exists, would have to be enforced in another proceeding. The interest which makes a witness incompetent must be an interest in the existing suit, not in some collateral proceeding.]

Secondly, if the suit should be dismissed with costs, the defendant would have a claim for those costs, not only against Pascall and Adams as the actual parties to the record but against all the guardians on whose behalf Pascall and Adams professed to sue, or, at all events, against those who were members of the committee, and who actually authorized the institution of the suit. There is an analogy for this in the practice of courts of law in actions of ejectment and others, where the plaintiffs on the record are mere nominal parties; for, in such cases, if the defendant obtains a verdict, process for costs issues against the real parties; and it is reasonable that a similar practice should exist in this court; for, strictly, all the guardians ought to have been actually named on the record as plaintiffs, in which case all would clearly have been liable for the costs; and it would be singular if the rule, which allows some to represent the whole body, being introduced for *their* *convenience, [*393] should deprive the defendant of a security which he would otherwise have had for payment of his costs.

THE LORD CHANCELLOR, without calling on the other side, said:—It is quite clear that the decision of the Vice-Chancellor was right. The witness tendered was originally a guardian, and of course a rate-payer, and in that character he was interested in the security taken for the benefit of the parish rates. But the objection to his evidence is not rested on that interest, but in his being a *quasi* party to the record. It is true the suit was instituted by the authority of certain persons of whom he was one; and, no doubt, as between him and the solicitor employed, he would be liable for the costs incurred; but it appears that he ceased to be under that responsibility in 1841, as all demands that the solicitor could have for costs up to that time have been settled.

It is, however, still said that he is incompetent as a *quasi* party to the record. But he could only be so in respect of his

1847.—*Scott v. Pascall*.

liability for costs if he could be reached by the defendant in the event of the bill being dismissed. And it is clear that the defendant in this cause could reach no one who was not actually a party named on the record. No doubt his liability, in that event, to his former colleagues or to the rate-payers generally for the share he had in instituting the suit, will remain behind; but that would have to be enforced, if it arises, in another proceeding: it does not attach upon him in this suit.

Then the only remaining objection is his liability in common with the other rate-payers, in respect of which his incompetency is removed by the statute. The motion therefore must be dismissed with costs.

[*394]

*IN RE PATRICK.

1847: Nov. 12.

On the death of a lunatic, where there had been no order for a maintenance, the personal representative offered to consent to an order for payment of a liquidated sum to the interim committee for past maintenance, in order to avoid the expense of a reference, the estate being inconsiderable. But the Lord Chancellor refused to sanction the payment, unless on the consent of the parties beneficially interested in the surplus of the estate.

MR. TERRELL on behalf of the interim committee of the person and estate of a lunatic, against whom the commission had issued in 1845, and who had since died, asked that (out of a sum of about £600 in court, being the whole of the lunatic's estate,) after payment of the costs of the commission, which had been taxed under a former order, a certain sum might be paid to the committee for the maintenance of the lunatic up to the time of her death (no order for maintenance having been made, but the administratrix admitting that sum to be the amount due, for the purpose of saving the expense of a reference;) and that the rest of the fund might be paid to the administratrix.

Mr. *Smith* appeared for the administratrix and consented to the order, but

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THE LORD CHANCELLOR refused to make the order without a reference, unless it were consented to by the parties beneficially interested in the lunatic's estate.

*TRULOCK v. ROBEY.

[*395]

1847: Nov. 18.

A bill of review for error apparent on the decree, applies only to errors of form, and not to errors of judgment upon the merits.

THIS was an appeal from an order of the Vice-Chancellor of England allowing a demurrer to a bill of review for alleged error on the face of a decree which had been enrolled.

On the nature of the case being stated, the Lord Chancellor asked, in what the alleged error consisted.

Mr. *Miller* for the appellant, said, that the original bill was filed for the redemption of a mortgage, made many years ago to the father of the defendant Thomas Robey who had devised it by will to his son. That it was alleged in the bill, and admitted by the answer, that the father had entered into possession of the mortgaged estate some years before his death, and that since his death the son had continued in such possession: but that the decree had confined the account of rents and profits to the possession of the son, which he admitted was all that the bill specifically prayed, but he contended that under the prayer for general relief, the plaintiff was entitled, upon the allegation and admission in the pleadings, to a like account during the possession of the father, though his personal representative was not a party, *Venables v. Foyle*,^(a) *Matthews v. Wallwyn*,^(b) and that such omission was therefore error apparent on the face of the decree. Another error which he suggested was, that the decree ordered the costs to be paid, instead of reserving them as was usual in "redemption suits against a mort- [*396]

(a) Ch. Ca. 2.
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(b) 4 Ves. 118.

1847.—*Trulock v. Robey*.

gatee in possession. *Wilson v. Metcalfe*,^(a) *Norrish v. Marshall*.^(b)

THE LORD CHANCELLOR.—These are not such errors as will support a bill of this kind. A decree may be a proper subject for a petition of rehearing and yet not be a proper subject for a bill of review ; and here, moreover, you complain of the decree for not having given you more than you asked by the bill.

Mr. *Miller* then submitted that the same grounds of error would support a bill of review, which were open upon a petition of rehearing, and that in that respect the enrolment of the decree made no difference ; in support of which he cited *Brend v. Brend*^(c) and *Benham Newcomb*,^(d) in both of which the error assigned was error in substance, not in form, and in which the Lord Keeper is reported to have censured the practice, which the registrars had adopted, of drawing up decrees with a general recital of the proofs being read, instead of stating what particular facts were allowed by the court to be well proved ; “without which,” his Lordship said, “a decree could never be reversed by a bill of review, but all erroneous decrees must be reversed upon appeal.” He also cited *Perry v. Phelps*.^(e)

THE LORD CHANCELLOR.—The two first authorities only show the truth of what has often been said, that those cases in *Vernon* are not to be depended upon, for no one ever [397] heard of the *registrar taking on himself to say what facts were proved. His business is to state what evidence was admitted : it is for the court to say what facts are established by it.

In the other case, Lord Eldon seems to lay down the rule as I have always understood it.^(f) He says, “There is a great distinction between error in the decree and error apparent. The latter description does not apply to a merely erroneous judgment.” A bill of this nature does not go to the propriety of the decision upon the merits, but deals only with what is contrary to the

(a) 1 Russ. 530. (b) 5 Madd. 475. (c) 1 Vern. 213. (d) 1 Vern. 215.
(e) 17 Ves. 173. (f) See 17 Ves. 173.

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forms and practice of the court. The objections raised by the present bill are quite distinct from that.(a)

Appeal dismissed with costs.(b)

*ANDREWS v. LOCKWOOD.

[*398]

1846: Nov. 13. 1847: Nov. 17.

Plea to a bill of revivor overruled on a point of form as tendering an immaterial issue.

THE defendant Lockwood, in 1839, instituted a suit against two persons named Andrews and Abdy, at the hearing of which, in 1845, a decree was made, whereby it was ordered that the bill should be dismissed with costs, and that such costs, when taxed, should be paid by Lockwood to the defendants, and by consent, it was ordered that certain documents which had been deposited with the record and writ clerk pursuant to an order therein mentioned, should be delivered up to the defendants.

Andrews having died before the costs were taxed under that decree, his widow and sole executrix filed this bill to revive the suit against Lockwood and Abdy, whereupon Lockwood put in the following plea.

This defendant, by protestation, &c., for plea saith that before the plaintiff exhibited her said bill, that is to say, on the 28th May 1845, the documents mentioned in the decree, and which were thereby ordered to be delivered to the defendants therein named, were, in pursuance of such decree, duly delivered accordingly, and that by the means aforesaid the said decree was before the filing of the said bill, fully performed and executed in

(a) Lord Redesdale defines "error apparent" only by an illustration. Speaking of a bill of review he says—"It may be brought upon an error of law, appearing in the body of the decree itself, or upon discovery of new matter. In the first case, the decree can only be reversed upon the ground of the apparent error; as if an absolute decree be made against a person who, upon the face of it appears to have been at the time an infant," *Red. Pl.* 64, 4th ed.

(b) See 15 Sim. 277, from which it appears that the Vice-Chancellor allowed the demurrer on a different ground.

 1847.—*Andrews v. Lockwood.*

all respects, save in so far as respects the taxation and payment of costs thereby directed to be taxed and payed, and the defendant doth therefore plead the matters aforesaid, &c.

The Vice-Chancellor of England, having allowed the [*399] plea on the ground that the practice of the *court did not allow the revivor of a suit for costs alone,^(a)

The plaintiff appealed; and the argument turned here, as it had done below, principally upon the supposed rule of practice.

Mr. Js. Parker and *Mr. Goodeve* for the appellant.

Mr. Bethell and *Mr. Heathfield* for the respondent.

Nov. 17.—THE LORD CHANCELLOR.—Two points were raised in this appeal: 1. Whether in the case of a decree merely directing the payment of costs, and the subsequent death of the party to whom such costs are ordered to be paid, the personal representative of such party could revive the cause for the sole purpose of taking the benefit of such order. 2. Whether the plea in this case properly raised the question, or whether the matter pleaded was not immaterial and the plea therefore bad. The first impression upon the mind of the Vice-Chancellor seems to have been against the plea upon this ground, and I think that impression was correct.

The bill of revivor states the decree, which was merely a dismissal with costs to be paid by the plaintiff, the party pleading to the bill of revivor, to the defendant, the plaintiff in the bill of revivor, but with this direction,—“And by consent it [*400] is ordered that the *documents deposited with the record and writ clerk, pursuant to an order in the said decree mentioned, be delivered to the defendant.” The plea is, that the documents by the decree directed to be delivered to the defendant have been delivered to him, and that all the decree has been performed except the payment of the costs.

(a) See 15 Sim. 153. Since this appeal was argued the report of *Bowyer v. Beauchamp* (2 Jon. & Lat. 228,) has appeared, in which the same question arose in Ireland, before Sir Edward Sugden, who after an elaborate review of the authorities, came to the same decision upon the rule of practice as the Vice-Chancellor.

1847.—*Andrews v. Lockwood.*

The only ground, upon which the fact of these documents having been delivered to the defendant could be considered as raising a material issue, would be, that such direction in the decree entitled the plaintiff in the bill of revivor to revive until it was executed, but that such right ceased the moment it was executed, the order to pay costs being assumed not to give such right. This can only be so if the direction to the clerk of records and writs to deliver the documents to the defendant could not be executed after the death of the party to whom they were to be delivered, without the suit being first revived. This proposition it is, I think, impossible to maintain.

The direction was not for any thing to be done by any parties to the dismissed suit, but upon an officer of the court, which, if he had hesitated to obey it, might have been enforced without any reference to the other party in the cause, and the propriety of which such party could not have questioned, the order being by consent. If, therefore, there had been no direction as to costs, but simply the direction as to the documents, and the same death had happened, I do not think that any revivor of the suit would have been necessary to obtain the benefit of this direction; and if this direction standing alone, would not have supported a bill of revivor, it cannot have that effect when coupled with another direction, which it is assumed would not *sup- [*401] port a revivor. If that direction, unperformed, would not have supported a bill of revivor, it must be immaterial whether it had been performed or not, and consequently the issue raised by the plea was not material, and the plea was therefore bad.

The case of *Askew v. Townshend*,^(a) strongly resembles the present. After a decree for a perpetual injunction and payment of costs by the defendant, he died. A demurrer to a bill of revivor was allowed, because, although there was other matter in the decree besides the costs, such other matter, *i. e.* the perpetual injunction, did not require a revivor of the suit. In that case the immaterial matter did not make the demurrer bad; in this, it cannot constitute a good plea.

(a) 2 Dick. 471.

1847.—*Andrews v. Lockwood.*

I think, therefore, upon this ground, without giving any opinion as to the important point decided by the Vice-Chancellor, that the allowance of this plea was erroneous, and that it ought to have been disallowed.

[*402]

*GIBSON *v.* INGO and Others.

1848: Jan. 17.

One of three defendants against whom a decree with costs had been made, being abroad and not likely to return, and his solicitor being dead, the court refused to order the Taxing Master to proceed with the taxation of costs upon warrants served only on the solicitor of the two other defendants; but ordered that service at the late residence of the absent defendant, where some of his family were still residing of a subpoena to appoint a new attorney, should be good service on the defendant. And upon such subpoena having been served accordingly and no attorney appointed, the court subsequently ordered the Master to proceed in the party's absence.

AFTER a decree with costs had passed against the three defendants, but before the costs had been taxed, the solicitor of Gilbert Simpson, one of the three, died, whereupon the Taxing Master refused to proceed until a new solicitor should be appointed. Gilbert Simpson, who was a master mariner, was abroad, and on inquiry at the house where he had resided before he left England, the plaintiff was informed by his father and sisters that he had sailed to America two years ago with his family in embarrassed circumstances, and that he was not likely to return.

Under these circumstances, a motion which had been refused by Vice-Chancellor Wigram was now renewed, by way of appeal, before the Lord Chancellor, that the Taxing Master might be ordered to proceed with the taxation, notwithstanding Simpson was out of the jurisdiction, and not represented by any solicitor; or that service of the Master's warrants in such taxation on the solicitor of the two other defendants might be deemed good service on Simpson, or that the court would make such other order as should seem meet.

Mr. Romilly and *Mr. Heathfield* for the motion.

1847.—Gibson v. Ingo.

In *Ratcliff v. Roper*,^(a) the clerk in court of a defendant being dead, and the defendant himself keeping out of the way to avoid service of a writ of execution. The court refused to proceed until a new clerk in court were appointed, [*403] but ordered that service of a *subpœna ad faciend. attorn.* at the residence of the defendant should be good service. In *Franchlyn v. Colhoun* and *Shillabar v. Langdon*,^(b) under similar circumstances, orders were made for substituted service on the solicitor of the party. The difficulty in this case arises from the late statute abolishing the office of the six clerks. Before that statute, in case of the absence of the party and the death either of his solicitor or clerk in court, a *subpœna ad faciend. attorn.* might have been served on the survivor.

THE LORD CHANCELLOR.—If I made the order as prayed, it might be a precedent for a plaintiff, in any case, going on after the death of a defendant without any one to represent him. There is nothing in the late act to warrant such an alteration of the practice. The clerks in court were merely privileged attornies, and the act only took away their privilege. What you want is an order for a *subpœna* on the defendant to appoint another attorney; that must be done according to the old practice.

Mr. Romilly then suggested, on the authority of *Ratcliff v. Roper*, that service of such a *subpœna* at the late residence of the defendant should be deemed good service on the defendant; and

An order was made in those terms.

On a subsequent day, Mr. Romilly stated, that a *subpœna* had on the 2d of February been duly served at the residence pursuant to that order, but that no attorney had been appointed, and he therefore asked leave to proceed with the taxation in the absence of Simpson.

(a) 1 P. Wms. 490.

(b) 12 Ves. 2.

1847.—Gibson v. Ingo.

[*404] *THE LORD CHANCELLOR.—Whenever the court orders substituted service it means to put the party in whose favor the order is made in the same situation as if there had been actual service. Therefore you may take the order.

COPE v. RUSSELL.

1847: Jan. 27.

When a party against whom a judgment had been recovered, had taken advantage of a stay of execution to convert all his personal property into money and go abroad, after notice from the creditor that he intended to file a bill to enforce the judgment against his real estate as soon as the interval required for that purpose by the statute 1 & 2 Vict. c. 110, should have expired. Held, on such bill being filed accordingly, that the defendant was to be considered as having absconded to avoid process in this suit, and, therefore, at all events within the 31st order of May 1845.

But *semble*. If it had appeared that he had gone abroad within two years before the filing of the bill to avoid process generally, that would have been sufficient within the meaning of the order.

THIS was a motion on behalf of the plaintiff, under the 31st General Order of May 1845, for an order preparatory to entering an appearance for the defendant on the presumption of his having absconded to avoid service.

The object of the suit was to enforce a judgment, recovered by the plaintiff against the defendant in December 1845, as a charge upon his real estates under the 1 & 2 Vict. c. 110., and the affidavit in support of the motion stated, that between the judgment and execution, which had been stayed for two months, the defendant had converted all his household goods and other personal property into money, and had since gone abroad, after having received notice from the plaintiff's solicitor that this bill would be filed as soon as the interval prescribed by the statute, after the signing of judgment should have expired.

[*405] *Mr. *Swift*, for the motion, said, that Vice-Chancellor Knight Bruce, before whom it had been made in the first instance, had expressed a doubt, considering the interval

1847.—Cope v. Russell.

of time that had elapsed since the judgment, and that the affidavit did not state at what particular period of that interval the defendant had gone abroad, whether the case was within the General Order, and therefore refused the motion, and suggested that the application should be made to the Lord Chancellor.

THE LORD CHANCELLOR.—The Vice-Chancellor appears to think that the process mentioned in the order means process in the particular suit only, whereas the order seems to refer to an absconding to avoid being served with process generally, for it supposes the case of a defendant who has been within the jurisdiction “at some time not more than two years before the subpoena was issued,” and the words of the order are “to avoid service,” not such service. But I will look at the affidavits before I make the order.

On the following day his Lordship said, that upon the construction of the order he remained of the same opinion that he had expressed the day before—that the absconding referred to in the order, meant absconding to avoid being served with process generally, within the time mentioned; but that, on reading the affidavit, it appeared to him that the question on which the Vice-Chancellor expressed a doubt did not arise, as his Lordship thought it sufficiently appeared from the facts stated, that the party had absconded to avoid process in this suit. He should, therefore, rest his judgment on that ground.

Motion granted.

*WATTS v. HYDE.

[*406]

1847: Nov. 17.

An order made at the hearing of a cause in the court below, by which the plaintiff was allowed to amend his bill for the purpose of making a better case, but not to alter the prayer or go into new evidence, and the defendant was to be at liberty to put in a further answer, and examine witnesses, if necessary, in support thereof was, upon appeal, discharged. And the practice generally, of allowing amend-
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ments at the hearing, except for the purpose of making the record complete as to parties, or, under particular circumstances, adapting the prayer to the case made and proved, was reprobated as dangerous, and unwarranted by the established rules of procedure in Courts of Equity.

At the hearing of this cause before Vice-Chancellor Knight Bruce on the 31st of January 1846, his Honor being of opinion that the facts appearing in evidence would have supported a more favorable case for the plaintiff than that made by the bill, and one which, if unanswered by the defendant, would entitle the plaintiff to the relief actually prayed, made an order that the plaintiff should be at liberty within ten days to amend the bill by making such case expressly, but not to extend or vary the prayer, or require any answer to the amendment; and that the defendant should be at liberty to put in an answer to such amendments within three weeks from that time, which answer, if any, was to be accepted by the plaintiff, and was to be considered as having been replied to immediately after filing the same; and the plaintiff was not to be at liberty to examine any witnesses without leave of the court, but the defendant whether answering or not answering such amendments was to be at liberty within six weeks of that time to examine any witnesses for the purpose of resisting the case, if any, which should be made by the amendments, whether such witnesses should or should not have been already examined in the cause; and publication of such evidence was to pass at the end of the said six weeks without further order, if and the said amendments should be made, it was ordered that the cause should stand on [*407] the paper to be further heard on "the 23rd of March then next, and the parties respectively, whether a cross bill should or should not be filed were to be at liberty to apply to the court for a variation of either of the times aforesaid as they might be advised, and, if the bill should not be amended, it was ordered that the cause should stand for judgment on the record as it then stood, on the 21st of February then next.

The bill was amended pursuant to that order, and the defendant put in an answer to the amendments, and examined witnesses in support thereof. And upon the cause coming on again

1847.—*Watts v. Hyde*.

to be heard upon the amended record, the Vice-Chancellor made a decree for the plaintiff with costs.

The defendant appealed both from the order of the 31st of January, and from the decree.

Mr. Anderdon and *Mr. Hallett*, for the appellant.

Mr. Bacon and *Mr. Stevens*, for the respondent.

On the nature of the order being stated—THE LORD CHANCELLOR said, the practice was new to him, and asked whether there was any precedent for such an order.

The counsel for the respondents not being prepared with any, the case stood over that they might search for authorities.

On a subsequent day the point was argued, and the following authorities were referred to in addition to those mentioned in the judgment; *Redesd. Pl.* (4th ed.) *pp. 55. [*408] 326. *Pritchard v. Quinchant*, (a) *Hamilton v. Houghton*, (b) *Attorney-General v. Fishmongers' Company*, (c) *Cox v. Allingham*. (d)

THE LORD CHANCELLOR.—The petition of appeal complains of an order of 31st of January 1846, permitting the plaintiff to amend his bill after the cause was in hearing, and of the decree made upon the bill as amended, dated 23rd of March 1846; and the question I now have to consider is, whether the order was consistent with the practice of the court and one which ought under the circumstances to have been made.

The case made by the bill at the hearing was, that the plaintiff, being indebted, executed a deed, covenanting to pay 1500*l.* in three payments of 500*l.* each to trustees to be divided amongst the creditors, and to insure his life in that sum, with a proviso, that the deed should be void if the insurance was not made and kept up; in consideration of which the creditors released their

(a) *Ambl.* 147. (b) 2 *Bligh*, 169. (c) 4 *Myl. & Cr.* 8. (d) *Jac.* 337.

1847.—*Watts v. Hyde*.

claims against him. The defendant, a creditor, executed the deed, and afterwards brought an action for the debt claimed by him, and it being held by the Court of Exchequer that the plaintiff could not be protected by the release in the deed, the insurance not having been effected, the bill was filed, setting up alleged equities against the defendant making this objection to the deed, such as, that he knew that the insurance had not been effected, and yet was a party to the plaintiff's acting under the deed by paying the instalment agreed to be paid to the trustees, and praying that the deed might be declared to be binding in equity *upon the defendant, notwithstanding the non-insurance, or that an account might be taken of the defendant's debt, and for an injunction against proceedings at law.

The cause coming on for hearing upon the bill and the evidence taken in the cause, the court made the order appealed from, viz., that the plaintiff should be at liberty within ten days to amend the bill by making expressly such case if any as he had for relief on the ground, or in consequence of such agreement, promise, or understanding, if any, as there was on the part of the plaintiff and defendant or either of them, that the debt due from the plaintiff to the defendant at the time of the resolutions in the pleadings mentioned should be paid in full by the plaintiff, notwithstanding such resolutions, and notwithstanding such release; but the plaintiff was not to extend or vary the prayer of the bill.

What equities might arise from the fact of such an agreement having been made, it is not material to consider, as it is certain that no such case was made by the bill; for the bill was to enforce the provisions of the deed against the defendant, notwithstanding the omission to insure by the plaintiff, upon certain conduct imputed to him, but not upon the ground of any understood agreement between the plaintiff and defendant. The order, in fact, proves that the case so to be made by amendment was a new case.[1]

[1] After publication of depositions, and the cause set down for hearing, it was held the original bill could not be amended by making new parties or charging a new fact. *Pleasant v. Logan*, 4 Hen. & Munf. 489. In *Verplank v. The Mercantile*

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The evils which must necessarily attend making a new case after the cause has been brought on for hearing, are so obvious that it cannot be necessary to enumerate them, and I have frequently of late taken occasion to express my opinion of any relaxation of the practice in that respect. The rules which regulate pleading and the conduct of a cause, and particularly the taking of evidence, are framed for the purpose [*410] as far as as possible of enabling both parties to bring their case fairly and fully before the court, and to guard against those dangers, particularly with respect to evidence, which the mode of proceeding in equity is too much calculated to produce. These objects would be defeated and these guards become inoperative if a new case were permitted to be made at the hearing; and such an order as this has the additional objection, that holds out a kind of promise to the plaintiff, that if he can make out such a case as the order suggests, the court will grant him relief. It is true that the order prohibits the plaintiff from going into any evidence without leave of the court; but if he has already, and before any such case was made, given evidence upon which he can rely to support it when made, such evidence must have been given improperly, there being no matter in issue to which it could apply; and the defendant who for that reason was not bound, and could not be expected, to answer it, is now with full knowledge of his adversary's evidence to do what he can to contradict it—a course contrary to all the rules of courts of equity, whatever may be the merits or demerits of such rules.

It is not, however, from any opinion of my own as to the evils

Insurance Co., 4 Edw. V. C. R. 46, it was held, that amendments can only be granted when the bill is defective in parties, or on the prayer for relief, or in the omission or mistake of a fact or circumstance connected with the substance, but not forming the substance itself, nor repugnant thereto. See also *Lyon v. Tallmadge*, 1 John. Ch. R. 184. *Shepherd v. Merrill*, 3 John. Ch. R. 423. Where a bill had been filed for a particular purpose and had been sworn to for the purpose of obtaining an injunction, which injunction has been dissolved upon the coming in of the answer, denying the whole equity of the bill, the Chancellor refused to allow an amendment, the effect of which would have been to have changed the whole character of the litigation. *Lloyde v. Brewster*, 4 Paige, 538. In *Thorne et al. v. Germond*, 4 John Ch R. 363, Chancellor Kent held, that if a witness has been examined, the pleading cannot be altered or amended, unless under special circumstances, or in consequence of some subsequent event unless it be for the sole purpose of adding parties.

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likely to arise from the permission given by the order appealed from, that I feel it impossible to sanction it. It is a question of practice and a case of discretion; and I have made these observations only for the purpose of showing the grounds upon which I decline to relax the practice upon this subject, by which I mean the existing practice; for I am aware that there are instances, particularly in former times, of great latitude having been allowed as to amending bills, and it is and must be a matter of discretion; but that discretion ought to be regulated by what has been found "most secure for and beneficial to the suitor. I, therefore, for this purpose look to the case of *Palk v. Clinton*,^(a) in which the question was much considered by Sir W. Grant. I have no disposition to go beyond that case, or to depart from the rule as there laid down. The case made by the bill was, as to the existing defendants, complete, and required no alteration; and if the bill had prayed only general relief, what the court thought the plaintiff entitled to might have been decreed; but the bill prayed specific relief, to which the court thought him not entitled, and the praying of which prevented the court from assisting him under the general relief. The court therefore permitted him to amend by praying the relief to which the court thought him entitled. There was no new case made, no new matter put in issue, no new evidence, and therefore none of the objections to which I have before alluded. It is therefore no authority for the order complained of; but the grounds upon which Sir W. Grant put his order are conclusive against it, for he says, "To the extent of allowing you to alter the prayer, I have no objection, but I can find no authority for amending the bill generally;" and again: "I was disposed to permit the plaintiff to vary his prayer, not extending it to any variation in the body of the bill further than he might upon the mere permission to add a party." In the present instance a new case is permitted to be made in the body of the bill, but no variation in the prayer.

Cases of permission to amend by adding parties have no application to the present. Such amendments necessarily follow-

(a) 12 Ves. 62.

 1847.—*Watts v. Hyde*.

ed the adoption of the rule not to dismiss a bill for want of parties. Such statements as might be *necessary to [*412] show them proper parties, or, as in some cases, to show why proper parties could not be made defendants, were indispensable; but the suit, as against the former defendant, remained just as it was, so that the practice was not open to any of the objections inseparable from making a new case against existing defendants. Similar observations apply to a case of *Magdalen College v. Sibthorp*,^(a) in 1826, when leave was given to amend a bill by making it an information and bill, or information only. There may, perhaps, be other objections to the order, but it does not assist the appellant's case.

I think the order appealed from, if affirmed, might lead to the introduction of a dangerous practice. I must therefore discharge that order.

 *LACEY v. INGLE.

[*413]

1847: Nov. 17.

A. having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances: part of the purchase-money was to be paid down, and the rest on the completion of the purchase. During the investigation of the title, A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase-money, and having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mortgage, became insolvent and absconded. A. thereupon, with notice of all that happened, paid off C.'s mortgage out of the balance of the purchase-money remaining due, and E., to secure himself, took an assignment of B.'s mortgage. But the balance of purchase-money not being sufficient to pay both E.'s charge and what E. had paid to B., Held, reversing the judgment below, that E. was not entitled to tack his security to B.'s mortgage, first, because, his security was not a security on the estate but only on the purchase-money: and, secondly, although E. at the time he advanced his money had no notice of any particular incumbrance, on the estate except B.'s, he knew that he was dealing for a supposed balance out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off any incumbrances to which the estate might be found to be subject, and therefore the equities of D. and E. were not equal.

 (a) 1 Russ. 154. See post, *Bellamy v. Sabine*.

1847.—*Lacey v. Ingle*.

On the 21st April 1842, Mrs. Lacey (the plaintiff) agreed with Henry Rogers for the purchase of an estate, which he had bought on the 2d of January in the same year and of which he was then in possession, for the sum of 5,200*l.* of which 1040*l.* was to be paid down, and the residue on the completion of the purchase. The 1040*l.* was duly paid and abstracts of title were delivered, from which it appeared that the property had been acquired by Rogers under four distinct purchases; the largest of which, consisting of about 266 acres, had alone been completed and paid for. Under these circumstances it was agreed, that the purchase monies due from Rogers to the several parties from whom he had purchased the three other portions of the estate, and amounting respectively to the sums of 294*l.*, 550*l.*, and 350*l.* should be paid to them out of the balance of the plaintiff's purchase-money remaining unpaid; and that she should have separate conveyances direct from those parties. The abstracts were approved in the month of October, but some delay occurred in verifying them, Rogers representing that the deeds relating to the 266 acres were in the custody of a third party, from

[*414] *whom he had only a covenant to produce them. In the meantime, and on the 28th October, he applied to the plaintiff to advance him a further sum on account of the purchase-money, which she accordingly did, to the amount of 350*l.* A few days afterwards she paid to one of the unpaid vendors 550*l.*, the amount of his purchase-money, pursuant to the agreement above-mentioned; and she was, about the same time, let into possession of the whole estate, the subject of her own purchase, without prejudice to any objections to the title.

On the 28th November, the plaintiff's solicitor having been informed that the title deeds relating to the 266 acres were in the possession of Messrs. Foster and Sons, solicitors at Cambridge, he attended at their office for the purpose of examining them with the abstract, when he was informed by the Messrs. Foster, that Rogers had, on the 8th of January 1842, executed a legal mortgage, in fee, of those premises to one Brown, a client of theirs, for securing 1500*l.*, and that by an indenture of the 21st of April 1842, he had assigned the benefit of his contract with the plaintiff to the defendant Ingle, who was also a client of

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theirs, to secure the sum of 800*l*. then advanced to him by Ingle : and that it was upon that occasion agreed that the title-deeds, which were already in the hands of the Messrs. Foster as solicitors for Brown, should as between Rogers and Ingle, be considered as remaining in their hands as a security for the 800*l*. advanced by Ingle. Two days after the discovery of these incumbrances Rogers absconded, and a fiat in bankruptcy issued against him, under which he was declared a bankrupt.

On the 20th of December following, the plaintiff received a notice from one Wilkinson to the effect that Rogers had on the 28th of January 1842, executed to him an equitable mortgage in fee of the 266 acres, *accompanied by a de- [*415] posit of his own purchase deed thereof, and a document purporting to be an abstract of the title thereto, to secure the sum of 2000*l*.; and that that sum with interest still remained due.

On inquiry it appeared that the deed so deposited with Wilkinson, was, in fact, a forged duplicate of Rogers' real purchase deed, which had been previously deposited, along with the other title deeds, in the hands of Messrs. Foster on the occasion of Brown's mortgage, and that Wilkinson had no notice of that mortgage when he advanced the £2000, and took his own security.

In the course of the year 1843 Wilkinson instituted a suit to enforce that security, which the present plaintiff compromised on the 11th of December, 1843, by the payment to Wilkinson of £1500 in full satisfaction of his claim for principal and interest; and thereupon by an indenture of that date, which recited that the plaintiff was desirous that the said sum of £2000 and interest should be kept alive as a subsisting charge or lien upon the premises for her benefit as against all other persons having or claiming any charge or lien thereupon, the said sum of £2000 and interest, and Wilkinson's security for the same were assigned to one Partridge as trustee for the plaintiff.

The £1500 so paid to Wilkinson, together with the sums previously paid, or agreed to be paid, on account of the purchase-money, and the £1500 due on Brown's mortgage considerably exceeded the gross sum payable by the plaintiff under her

 1847.—*Lacey v. Ingle.*

agreement, and therefore left nothing for the payment of the £800 advanced by the defendant on the security of the 21st of April. But he having on the 2d of June 1843, paid off Brown, and taken an assignment of his mortgage; insisted that he had a right to tack his debt of £800 to that mortgage, [*416] *and that the plaintiff was not entitled to redeem the latter without paying the former also. It was to determine that question that this suit was instituted, praying redemption of the mortgage without payment of the £800.

It was admitted in the cause, that neither the plaintiff nor her solicitor had any notice of Brown's mortgage or of the defendant's security until the 28th of November 1842; or of Wilkinson's security until the 10th of December 1842.

Vice-Chancellor Knight Bruce, before whom the cause was heard, having decided in favor of the defendant's right to tack, the plaintiff appealed.

As the argument turned chiefly upon the effect of the indenture of the 2d of July 1842, the defendant's original security, it is necessary to set forth a short abstract of its provisions.—After reciting Roger's contract with the plaintiff as one by which £200 only out of the £5200 was to be paid down, and the remainder on the completion of the purchase, and that Rogers having occasion for the loan of £800 had requested the defendant to lend him the same, which he had agreed to do upon having the repayment thereof, with interest, secured by an assignment of the monies to arise from the sale of the premises comprised in the before recited contract in manner thereafter contained; It was witnessed, that in consideration of the sum of £800 then paid to Rogers by Ingle, Rogers did grant, bargain, sell, and assign unto Ingle, his executors, &c., all the sum of £5000 so agreed to be paid to Rogers, as the balance of the price for the said premises contracted to be sold by the before recited agreement, and all and every other sum and sums of money, rents, profits and interests, which should become due and payable to Rogers under the same agreement, and all right, *title, &c., [*417] both at law and in equity, of Rogers, of, in, and to the said sum of £5000, and all other the said sum and sums of money, interest, and premises aforesaid, or any part thereof, and

also the said agreement itself; To have, hold, receive, and enjoy the said sum of £5000, and all and singular other the premises thereby assigned, unto Ingle, his executors, &c., as his and their absolute property, with the usual powers to Ingle to use the name of Rogers in enforcing the said agreement, and recovering payment of the said sum of £5000, the balance of the said purchase money. Then followed the trusts on which Ingle was to hold the money when recovered, which were, to repay himself the £800, with interest, and to pay the surplus to Rogers, his executors, &c. And after the usual covenants for title, there was this proviso and covenant: that, in the event of the before recited agreement for sale not being carried into effect, in consequence of any deficiency or imperfection of title to the premises, Rogers, his heirs, or assigns, would, at the request of Ingle, his executors, &c., but at his own cost, make and execute a good, valid, and effectual mortgage of the said hereditaments, for securing to Ingle, his executors, &c., the repayment of the £800 and interest, subject nevertheless to the mortgage of Brown for securing the sum of £1500 and interest, so far as the same affected the hereditaments comprised in the said agreement.

Mr. *Russell* and Mr. *Chandless* for the appellant, Mr. *Wigram*, Mr. *Bacon*, and Mr. *Prior* for the respondent.

On behalf of the appellant, it was insisted that the effect of the deed of the 2nd of July was, in the event which had happened, viz. the completion of the *plaintiff's purchase, [*418] only to give the defendant a security for the £800 on the purchase-money and not upon the estate, and, therefore, that the legal estate, which he had acquired by assignment from Brown, would not protect him against the priority of Wilkinson's mortgage: for, that the doctrine which entitled a subsequent equitable incumbrancer to exclude a prior one, by getting in an outstanding legal estate, applied only where such subsequent incumbrancer had originally advanced his money on the security of the land itself, *Ex parte Knott*; (a) and that the possession

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of the title-deeds would not give the defendant in this case a better right than the deed itself; first, because the delivering of title-deeds would not constitute an equitable mortgage, if accompanied by a written contract purporting to create a different kind of security; and, secondly, because the defendant, having express notice of the plaintiff's purchase when he advanced his money, must have known that Rogers had no power to mortgage the estate, except on the contingency of that purchase going off; and the provision of the deed itself showed that such was, in fact, the understanding of the parties.

On the other hand, it was contended that a security upon the purchase-money, for an estate contracted to be sold, was a security on the vendor's lien upon the estate which was incident to such contract, and, therefore, in effect, a security upon the estate itself; and it was also observed that the plaintiff had been guilty of culpable negligence in advancing so large an amount of the purchase-money, as she had done in this case, before she had verified the abstract by an examination of the deeds, which would have led her to the discovery of the frauds practised by the vendor, and of the defendant's charge, as well as of [419] the other incumbrances on the estate. To which it was replied that the defendant had been equally negligent in not giving immediate notice of his security to the plaintiff.

THE LORD CHANCELLOR, in the course of the argument, repeatedly observed, that the respondent had to make out no less a proposition than this, that a vendor's lien for the purchase-money could be used to exclude a previous incumbrancer on the estate.

THE LORD CHANCELLOR.—The decree appealed from declares that Wilkinson's charge of 28th of January, 1842, is to be postponed to, and considered as a later charge on the estate than the charge of £800, secured to the defendant by the deed of the 2d of July 1842; which is not an accurate exposition of the principle of tacking upon which the decree is founded: but in effect it declares that the defendant, having got in Brown's mortgage, the first in date, is entitled to resist redemption of that mortgage,

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except upon payment of what he himself advanced under the agreement of the 2d of July 1842, or, in other words, that he is entitled to tack this debt to Brown's mortgage.

I do not concur in this opinion and declaration. A party claiming to tack must, as against the party against whom the tack is to operate, have advanced his money upon the credit of the land. Secondly, he must, except as to time, have an equal equity; and, thirdly, which follows from the last, he must have advanced his money without notice of the other's claim. It appears to me that all these requisites are wanting in this case. Brown's mortgage was a strictly regular, legal mortgage. Wilkinson's was a good equitable charge, although a gross fraud was practised upon him in the concealment of Brown's mortgage. On the 21st of April 1842, the agreement was signed, by which *Rogers, though he concealed the existence of these mortgages, agreed to sell to the plaintiff, *free from all incumbrances*, the lands so mortgaged and charged, and other lands, and he agreed to get in, at his own expense, all legal and equitable estates whatsoever. It appeared that Rogers had contracted for the purchase of part of the land so agreed to be sold to the plaintiff, but had neither obtained the purchase-money nor obtained a conveyance. [*420]

There can be no doubt as to the right of the plaintiff, as against Rogers, in this state of circumstances. She was entitled to call upon him to convey the estate free from all incumbrances, or to deduct the amount from the purchase-money; and in the same manner she was entitled to apply a sufficient portion of the purchase-money in paying the consideration for those parts of the estate which Rogers had only agreed to purchase; and that is the position in which she now stands: for having made these last payments, and bought up Wilkinson's claim, and deducting the amount of Brown's claim, she is seeking to redeem that mortgage; and, but for the defendant's claim under the agreement of the 2d of July 1842, no question could be raised as to her right.

But the defendant says, that by that agreement he obtained such an equitable charge upon the estate, that he is entitled to tack it to Brown's mortgage, since got in by him, and so to call

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upon the plaintiff to pay both. That agreement begins by reciting the plaintiff's agreement of purchase of 21st of April 1842, and that it had not been completed, and that the defendant Ingle had agreed to advance £800 to Rogers, upon having the re-payment thereof, with interest, secured by an assignment of the monies to arise from the sale of the premises comprised [421] in that contract: "and thereupon Rogers assigns such purchase monies, so agreed to be paid to the plaintiff to Rogers as the balance of the price or consideration for the said premises so agreed to be sold to the plaintiff, and all other sums which might become due to him under the said agreement, with liberty to use Roger's name to enforce the agreement, and compel payment of the money; and he was to hold the monies so to be received, upon trust to redeem Brown's mortgage, to pay himself the £800, and to pay the balance to Rogers; and Rogers covenanted, that in case the agreement for sale to the plaintiff should not be carried into effect, in consequence of any deficiency of the title, he would make and execute a good and effectual mortgage of the premises comprised in the said agreement, for securing to the defendant the £800 and interest, but subject to Brown's mortgage.

It is quite clear, that in the event which has happened, of the plaintiff's purchase being carried into effect, the defendant did not lend his £800 upon the security of the land. In that event he looked to the purchase-money only; and so the deed expresses it, and so it must have been: for the recited agreement with the plaintiff showed him that Rogers would in that event have no interest in the land. But if the money was not advanced upon the credit of the land, no case of tacking can arise. This is strongly exemplified in the case put in *Brace v. Duke of Marlborough*,^(a) and adopted by Lord Eldon in *Ex parte Knott*,^(b) "A mere judgment creditor, though he deals originally for a lien, does not get an estate originally in the land; he has neither *jus in re*, nor *jus ad rem*: but if there be once a creditor by mortgage, and he afterwards advances money upon a judgment, the court will intend that he makes that ad-

(a) 2 P. W. 491.

(b) 11 Ves. 617.

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vance meaning to take "a security upon the land for [*422] both, and he may tack; but if he remains a mere judgment creditor, the court says he does not deal upon the faith of the land in this sense, that he does not contract for an interest in the land and therefore is entitled only, as a judgment creditor, to an elegit, and he cannot tack." How much stronger is that case than the present, in which the defendant not only did not deal upon the faith of the land, or contract for any interest in it, but, as appears upon the face of his contract, relied upon and advanced his money upon the faith of, a fund, which could only arise and have existence upon the supposition that the party to whom he advanced the money would not have, and at that time had not, any interest in the land.

The Vice-Chancellor has reasoned this case as if the contest had been between Wilkinson and the defendant. I think it quite unnecessary to follow that reasoning, because it is not in my opinion, founded upon a correct view of the different interests. The plaintiff has indeed taken an assignment of Wilkinson's charge, and cannot be prejudiced by having so done; but I do not think that such assignment improved her position beyond what it would have been if she had merely paid his charge out of her purchase-money. The real question is, whether, as against the defendant, the assignee of the purchase-money, she can justify the application of part of it in payment of Wilkinson's charge, and in relieving the estate purchased by her from such charge. As against Rogers, her right so to do would not be disputed, whatever may have been the relative position of the defendant and Wilkinson; and I cannot understand how the defendant, purchasing of Rogers his title to the purchase-money, can have a larger right than the assignor had; and this opens the second objection to the principle of tacking being applied to this case. In **Brace v. Duke of Marlborough*,^(a) [*423] the Master of the Rolls said, "in all these cases it must be intended that the puisne mortgagee when he lent his money had no notice of the second mortgage, statute, or judgment; for that is the sole equity." How can this defendant say that he

(a) 2 P. W. 495.

 1847.—*Lacey v. Ingle*.

had not notice of the plaintiff's right to apply her purchase-money in paying off any incumbrances affecting the estate, when his agreement recites the plaintiff's agreement of purchase under which that right arises? That he did not know of Wilkinson's charge is nothing, as he had notice of the plaintiff's right to pay off any charge; and it is against that equity he is now contending. He was dealing for a supposed balance or surplus, but he is contending for the nominal purchase-money without reference to what was properly to be deducted from it. How can it be said that in this case the equities of the parties are equal? Look at their contracts. The plaintiff for a certain sum was to have the estate free from incumbrances: what she has paid to the vendor and to some incumbrancers, and is prepared to pay to others, will exhaust the whole of her purchase-money. But the decree says, that she shall not have the estate conveyed to her, free from the incumbrances, because by a fraud practised upon the defendant by Rogers in suppressing some of these incumbrances, and thereby leading him to suppose that there would be a surplus of the purchase-money, he was induced to advance a sum of money upon the faith of such supposed surplus. The plaintiff was no party to this fraud; and why are her rights to be affected by it? The decree deprives the plaintiff of what she contracted for, namely, the estate, free from incumbrances, for the purchase-money agreed for, but gives to the defendant what he never contracted for,—a lien, for the money he advanced, upon the land in the hands of the purchaser.

[*424] *The defendant has gone into evidence to show that, in the opinion of some professional gentlemen, it was improvident for the plaintiff to have paid so much on account of the purchase-money before the state of the title had been ascertained. Such payments may have been improvident, and might have produced injury to the party paying, but they cannot give any right to the defendant, who did not give any notice of his claim until after all the voluntary payments had been made. He taking a charge upon a chose in action, a supposed surplus or balance, and taking no measures to ascertain the state of the account, nor giving, to the party to pay, any notice of his claim, was guilty of much greater neglect.

1847.—*Lacy v. Ingla.*

The defendant also makes it part of his case that, at the time his agreement was made, the title deeds, which were in the hands of the solicitor for Brown, the first mortgagee, were, as between Rogers and the defendant, declared to be held for the defendant's security. This is at variance with the agreement, unless it be taken to refer only to the possible event of plaintiff's purchase not being completed, and in that sense only can I receive such evidence; but had it in terms applied to an absolute charge upon the deeds, the defendant's case would not have been improved, because at that time the defendant had full knowledge of the plaintiff's agreement and purchase, and that the deeds were her's and not Roger's.

I am therefore of opinion that the plaintiff is entitled to redeem Brown's mortgage upon payment only of what is due upon that security; and as the whole of this litigation has arisen from the claim of the defendant to tack his debt, which I am of opinion he is not entitled to, he must pay the costs up to the hearing, including the costs of the hearing. The decree must be varied accordingly.

*BELLAMY v. SABINE.

[*425]

1847: Nov. 8.

Semble. If a fraud has been practised on a tenant in tail, which has been carried into effect by means of a recovery, and the tenant in tail dies without issue and without confirming the transaction, the next remainder man in tail may maintain a bill to set it aside. *Secus.* If the recovery were suffered with the intention of barring the entail, and the fraud applied only to some part of the transaction independent of that object.

If an arrangement between two parties is, on general principles, fair as between them, it is not invalid merely because it may have been concocted and brought about by a third party with a fraudulent intention of benefitting himself.

In such a case, so far as regards the third party, the whole may be looked upon as one transaction, in order to judge of his motives and to put a construction upon his acts: but as regards the other two, who, though affected by one part of the transaction, may be total strangers to the other part, it is not only not necessary, but it would be unjust, to consider every part of the transaction affected by objections which, in fact, apply only to particular portions of it.

Circumstances to be taken into consideration in judging of the fairness of an arrangement between a father, tenant for life, and son, tenant in tail, for barring the entail.

 1847.—*Bellamy v. Sabine.*

Where the main consideration moving from the son was an undertaking to pay the father's debts, even the circumstance of several of the most important items being left in blank was held insufficient to set the transaction aside, as against the father, though the son was only just of age; as a family arrangement of that description cannot be supposed to have depended upon any very exact calculation as to the amount of the debts.

Where a young man, just of age, was imposed upon in the sale of an estate, Held that his heir was not precluded from suing to set the sale aside by the circumstance of the party defrauded having by will decreed to a third party the balance of purchase-money remaining due at his death.

The principle of there being no equity as between real and personal representatives, has no reference to such a case; in which the Court proceeds upon the ground that, as the transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction.

An agreement between a father, tenant for life, and an eldest son, tenant in tail, for certain considerations, to bar the entail and convey the estates to the son, was followed within a fortnight by the sale of the estate by the son to the solicitor who had acted for both parties in the agreement. In a suit after the death of the son without issue, by the next remainderman in tail, who was also heir at law of the son, to set aside both transactions, and to have the estates resettled to the former uses, the court was of opinion upon the evidence that both transactions were but parts of one scheme, contrived by the solicitor for his own benefit; but being also of opinion that on the principle of family arrangements, the agreement between the father and son was not necessarily an unfair one in itself, the Court set aside the second only, and dismissing the bill as to the first, decreed the solicitor to convey the estate to the plaintiff in fee.

On a bill subsequently filed by the father against the plaintiff in the former suit, complaining that since he had got into possession of the estates under that decree he had refused to perform the stipulations, in the father's favor, of the first agreement, and praying specific performance thereof; the Vice-Chancellor being of opinion, at the hearing, that the plaintiff had no equity for such relief, but that he had a right to be restored, as far as possible, to the condition in which he stood at the time of that agreement, gave him leave to insert, by amendment, an alternative prayer for relief of that kind; and on the amended record directed certain inquiries on that footing, conceiving that such decree was not inconsistent with that in the former suit. But, on appeal by the plaintiff, the Lord Chancellor held the contrary, and that whether the present plaintiff was or was not entitled originally to enforce the first agreement, the present defendant, by taking a conveyance of the estate under the former decree, had waived any equity he might have had to resist such a claim; and his Lordship made a decree for specific performance, at the same time disapproving of the order for amending the prayer which had not been appealed from.

Observations on the importance of confining inquiries, directed by a decree, strictly to the issue raised by the case upon the pleadings.

Semble. If a fraud has been practised on a tenant in tail, which has been carried into effect by means of a recovery, and the tenant in tail dies without issue and without

1847.—Bellamy v. Sabine.

having confirmed the transaction, the next remainderman in tail may maintain a bill to set it aside.

Secus. If the recovery were suffered with the intention of barring the entail, and the fraud applied only to some other part of the transaction independent of that object. If an arrangement between two parties is on general principles fair, as between them it is not invalid, merely because it may have been concocted and brought about by a third party with a fraudulent intention of benefitting himself.

Circumstances to be taken into consideration in judging of the fairness of an arrangement between a father, tenant for life and a son tenant in tail for barring the entail.

IN the year 1827 John Bellamy was seised in fee of an estate at Cheddington, in the county of Dorset, and was tenant for life, with remainder to his first and other *sons in [*426] tail, of other estates in the same county. Edward Bellamy, his eldest son, was then living, and had just attained twenty-one, and being a young man of dissipated and extravagant habits, with no property of his own except his reversionary interest in the entailed estates, and his father having mortgaged his interest in both the estates to a large amount, and being in great pecuniary embarrassment, they entered into an agreement under seal, dated the 8th of June, 1827, by which it was agreed that a recovery should be suffered of the entailed estates, and that those, as well as the estate at Cheddington, of which John Bellamy was seised in fee, should be conveyed to Edward in fee, he covenanting, in consideration thereof, to pay the debts due from his father to certain persons therein named, but of several of which the amount was left in blank ; to advance a sum of 600*l.* for the use of the family, and to pay certain annuities to his father and mother, and his brothers and sisters, which were to be secured upon the estates ; and also to grant to his father a lease for sixty years, if he should so long live, of a portion of the estates for his residence, at a pepper-corn rent.

That agreement was entered into, and the terms of it negotiated between the parties, by the instrumentality of Sabine, who had acted as the solicitor both for the father and the son in other transactions, and to whom the *father was at the *[427] date of the agreement indebted, for professional services and advances of money, to the amount of upwards of 5000*l.*, a small part of which only was secured by a mortgage of his life interest in the estates.

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On the 21st of the same month another agreement was entered into between Edward Bellamy and Sabine, by which Sabine agreed to purchase Edward's interest under the first agreement, and to assume the liabilities which he had thereby undertaken; the consideration for such purchase, as stated in the deed, being the sum of 541*l.* 7*s.*, therein stated to be paid down but which was in fact the amount of a debt then due from Edward to Sabine, and of a further sum of 3600*l.*, to be secured or paid at the option of Sabine, at the expiration of seven years.

FIRST SUIT.

In pursuance of the first agreement a recovery was suffered by John and Edward Bellamy in Hilary Term, 1828, and the estates were conveyed, by Edward's direction, to Sabine, pursuant to the second agreement. In the month of August following, Edward Bellamy died without issue, having by his will disposed of the balance of purchase money due to him under the second agreement, and leaving his next brother, Francis, his heir-at-law, who being also the person who but for the recovery would now have been first tenant in tail in remainder of the settled estates, filed his bill against Sabine, John Bellamy, and certain mortgagees under Sabine, alleging that both the agreements were but parts of one scheme, which had been concerted between John Bellamy and Sabine for the purpose of defrauding Edward, and praying that they might both be set aside, and the estates reconveyed by Sabine to the uses to which they stood limited at the date of the first agreement.

[*428] *How far the fraud was made out against John Bellamy and Sabine respectively, by the contents of the instruments, and the other circumstances of the transactions, as they appeared in evidence, will be seen from the judgment of the Master of the Rolls, before whom the cause was heard in the year 1835.

THE MASTER OF THE ROLLS.—(Sir C. C. Pepys.)—In this case I have not had the least doubt as to the plaintiff being entitled to a decree against the defendant Sabine, but I have had some difficulty in coming to a conclusion as to the extent to

which the decree ought to go as it affects the interests of the other parties. I will first consider the case as it affects the defendant Sabine.

It appears that the defendant John Bellamy, the plaintiff's father, was seised in fee of a house and some lands at Cheddington, and that he was tenant for life with remainder to his first and other sons in tail, of other property at South Perrott, Bervill, and Corscombe.

John Bellamy had, prior to the year 1827, become greatly involved, and had mortgaged his life estate, and also the Cheddington estate, and he was indebted to the defendant Sabine to a very large amount, of which 200*l.* only was secured by mortgage, and that upon the life estate in Bervill; besides which there was a bond debt of 600*l.*, with seven years' interest, and debts not secured upon a general account and for professional bills, amounting together, according to the defendant's account, to between 4500*l.* and 5000*l.*; besides which there was due to defendant Sabine's brother, upon bond and mortgage of the life interest in South Perrott, 2000*l.* principal and 340*l.* interest. The Cheddington estate *appears to have been [*429] mortgaged for a sum bearing a large proportion to its full value: 1300*l.* for principal and 195*l.* for interest was due upon the mortgage of that estate to Miss Deverest, and 300*l.* to Randall.

There was, therefore, due to the defendant Sabine and his brother, from John Bellamy the father, above 8000*l.*; and the whole value of his life estate was estimated by the defendant Sabine at only 5546*l.*; and of this 8000*l.* 3150*l.* was already charged upon the life estate, leaving only 2296*l.* of the value of the life estate, and the equity of redemption of Cheddington, to secure the balance of the 8000*l.*, all of which was due to the defendant Sabine. It was, therefore, obvious that John Bellamy was greatly involved, and that the defendant Sabine had no prospect of getting from him some thousands of what he claimed to be due. Independently of these sums, John Bellamy was indebted to other persons to a very considerable amount; under these circumstances, the defendant Sabine seems to have formed

a plan of making the inheritance of the settled estate available for the payment of what was due to him.

On his part it was contended, that the deed of 8th of June, 1827, between John and Edward Bellamy, which bears the appearance of a family arrangement, and the deed of 21st of June, 1827, which is a sale of the property in question to the defendant Sabine, were distinct transactions. I cannot believe this to be so. By the deed of the 8th of June, 1827, Edward Bellamy entered into a covenant with his father to pay the debts claimed by the defendant Sabine and his brother; but there is no contract with them, and they did not thereby obtain any security upon the inheritance, or claim against the owners of it; [*430] indeed, had that deed stood by itself, the defendant Sabine and his brother would have been in a much worse situation than they were in before, the effect would have been to deprive their debtor of the whole of his property and means of payment, without substituting any security in its place. It is impossible to attribute any such intention to the defendant Sabine. Had he been so generously disposed as to sacrifice his own interest and that of his brother, and the other creditors, to the object of making a proper arrangement between the father and the son, would he have advised such an arrangement as that deed contains? He had for his client a tenant for life involved greatly beyond the value of his life estate, and a tenant in tail in remainder not long of age, and admitted to be thoughtless, dissipated, and extravagant. By that deed the father parts with the whole of his property to the son, upon his covenant to pay his debts, not even charging them upon the inheritance, and leaving himself personally liable to them all; and the son is made to covenant to pay sums of money exceeding by several thousand pounds the value of the property he was purchasing, and was invested with the dominion over the inheritance, from which no good purpose to him could possibly arise; but if, on the other hand, the defendant Sabine had determined to make himself owner of the inheritance, and to turn the debt due, or claimed to be due, to him to the best possible advantage, by treating it as part of the purchase money, the whole arrange-

ment becomes intelligible, and the scheme well contrived for that purpose.

It appears that Edward Bellamy, the eldest son of John Bellamy, and first tenant in tail of the settled estates, attained twenty-one in August, 1826, and by the deed dated 8th of June, 1827, to which John Bellamy, the father and Edward are the only parties, it is recited "that John, the father, [*431] was indebted in £., and that he wanted money to pay his debts, and to make provision for his wife and younger children; and John thereby agreed to sell all his interest in the properties in question to Edward, upon consideration of having a life estate granted to him of the house at Cheddington, and certain lands there, and of an undertaking by Edward to pay £. [Here followed an enumeration of the mortgage and other debts of John Bellamy which Edward by the agreement undertook to pay, including amongst others the following:—]

"Also all sums due to the defendant Sabine on cash account and interest to 6th of April, not exceeding £ .

"Also all professional charges as steward and solicitor due to Sabine to 6th of April, not exceeding £ .

"All repairs done prior to 6th of April. Also to pay £150 to John Bellamy, to pay simple contract debts."

[His Lordship then enumerated the annuities and other sums which Edward was to pay to the other members of the family and continued.]

The sums so agreed to be paid, independently of the annuities, amounted, with interest, to about £11,000, to which being added the value of the annuities, and of the life interest in the house and lands at Cheddington reserved to John Bellamy, according to defendant Sabine's own calculation the sum of £15,727 is produced as the consideration agreed to be paid by Edward Bellamy for the property at Cheddington and the life interest of John Bellamy in the settled property. Of the value of the fee simple of the whole of the estates there is no evidence to enable me to come to any satisfactory conclusion. In exhibit M. the defendant Sabine states it at £15,150 but this is evidently understated to justify his purchase of Edward; and for the same purpose *he brings witnesses to prove the va- [*432]

lue to be from twelve to £14,000. To this little attention is to be paid, and Mr. Sabine seems to have forgotten that in depreciating the value of the property in order to justify his purchase of Edward, he is giving evidence, which, if believed, would render the transaction between the father and son still more extravagant and unreasonable than it was in fact.

Upon the best calculation I can make from the documentary evidence and statements, I think that the value of the fee simple of the property may be taken at about £17,800, only exceeding the value given by Edward for the life estate of his father and the fee of Cheddington by about £1300; and the value so given exceeding the value of the life estate, as calculated by Sabine himself in his letter of the 2nd of April 1827, and the fee simple of Cheddington, by about £6000. It is true, indeed, that as to the settled estates, it was worth while for Edward to give much more than its real value for the life estate of his father, because his was only a contingent interest, depending upon his surviving his father, without whose concurrence he could not bar the entail; and had no recovery been suffered, in the event which happened he could never have had any interest in the settled property. In the letter of the 2nd of April 1827, Mr. Sabine values the reversion of the settled estates at £8190, and deducting one-third on account of the contingency, values Edward's interest at £5460. Supposing this to have been an accurate calculation, the property remaining to Edward Bellamy, after deducting the consideration, ought to have been of that amount, instead of which it would appear from the defendant's, Sabine's, own calculation, to have amounted to a sum far less; but the calculation was evidently made for a particular purpose, and is, therefore, not to be relied upon.

[*433] "Upon this evidence, however, it would be impossible to support the first deed as a purchase. I shall presently consider how far this evidence is to be considered as giving a correct statement of the value, and how far this part of the transaction is to be considered as affected by other principles; but I am at present considering the case as it affects the defendant Sabine only, and I have entered so far into the consideration for this first deed to which Sabine was no party, for the

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purpose of explaining the grounds upon which I have come to the conclusion, that this arrangement between the father and the son was effected by Sabine only as a step towards effecting his ultimate object for his own benefit.

It appears by an account put in and approved by the defendant Sabine, that on the 21st of June 1827, the date of the agreement between Edward Bellamy and the defendant Sabine, Edward Bellamy was indebted to him in the sum of £541, part of which had been due from December 1823, two years and a half before Edward attained twenty-one, and of which sum of £541, above £160 had been advanced between the 8th and the 21st of June 1827, and the whole of it, except £141, after the month of March 1827, in which month it appears from Mr. Sabine's letter of the 24th of March that the arrangements between the father and son were in progress.

The items in this account prove the state of destitution in which Edward then was, and the readiness of Sabine to administer to his wants, arising probably from the means of repayment which he contemplated in the completion of the projected arrangement.

The agreement of the 27th of June 1827 merely provides that Sabine shall take upon himself all the liabilities *which Edward had assumed by the deed of the 8th of [434] June and that in consideration thereof, and of the £541 falsely stated to have been then paid by Sabine to Edward, and of £3600 to be paid to Edward, or at the option of Sabine to be secured to be paid (without saying how) to him at the expiration of seven years from the date of the conveyance, with interest at £5 per cent, but not made payable before the principal, Edward agreed to convey and assign to Sabine the absolute interest in all the properties, including the policies comprised in the deed of the 8th of June.

The first observation that occurs upon this agreement is, that it takes from Edward the only benefit he could have derived from that of the 8th of the same month. The only personal object he could have had in entering into the arrangement with his father was to relieve himself from his pressing necessities, and to provide for himself the means of future subsistence ; but

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by this agreement he is for seven years deprived of the possibility of deriving any pecuniary assistance from it, except by favor of Mr. Sabine. For that period at least, it placed him completely under the control of Mr. Sabine, and rendered him dependent upon him even for his subsistence. It took from him all means of performing his engagement with his father as to the debts, but left him subject to its operation ; for as the father was no party to this agreement, he would have been entitled, if compelled to pay any debt, to call upon his son ; and there was nothing to prevent any creditor, except perhaps Sabine himself, from exercising all their legal rights. Sabine, indeed, agreed to pay these debts, but he only personally agreed so to do. To provide for the payment of the debts was the professed object of the whole of the arrangement, but the result of it was that

both father and son remain personally liable, and Sabine [*435] gets the *estates unaffected by any of the debts, except those which were originally charged upon them, and the father and son, if called upon to pay, being deprived of all the property by means of which payment could be made, could have no redress, except under Sabine's personal undertaking.

Such is the transaction under which Sabine claims as purchaser from his client, a young man but recently twenty-one, in the greatest pecuniary difficulties, and of acknowledged extravagance and folly, if not of mental imbecility, of which there is strong evidence, but to which I think it unnecessary to advert, the other facts of the case rendering that immaterial for the objects of this suit ; and for the same reason I pass over other facts, most important if further proof were required, such as the fact that the transaction with this young man was carefully concealed from the father, and from the present plaintiff when he asked for information as to the estates. Mr. Sabine indeed attempts to prove not only that he gave the full value for the property, but by the account stated in exhibit M. represents that he gave 4,720*l.* above the value. It would be difficult to give credit to any evidence to prove such a proposition, and as proof of the inaccuracy of that statement I will only observe that in estimating the value of the property purchased he takes the value of the reversion only of that part of Cheddington reserved to John Bellamy, although he

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charges as part of the consideration the value of his life interest, and there is no proof in support of the valuations in other respects which can be relied upon. So the consideration for this purchase consists partly of debts which Sabine agrees to pay, but as to which he is under no liability to the creditors, and partly of debts alleged to be due to himself to between 5000*l.* and *6000*l.*, for which he had no security, and [*436] only the personal liability of John Bellamy, who was professedly insolvent, to look to. What part of the debts due to others he may have expected to be called upon to pay, what was really due to himself, and what portion of it he had any hope of recovering from John Bellamy, are considerations essential to any estimate of what he thought he was giving for the property; and of this there can be no proof.

Some attempt was made to prove acquiescence on the part of Edward Bellamy, and an election by his will to abide by the sale; but it appears that the recovery was not completed till Hilary term 1828, and he died in August 1828. His will professes indeed to dispose of money, and very possibly he conceived the transaction as conclusive as to himself and his property, but he was, up to the time of his death, more in the power of Mr. Sabine than he had been before. Much more than this is required to deprive a party of his right to complain of a fraudulent purchase of his estates. I think, therefore, that there is in this case much more than sufficient to bring Mr. Sabine's purchase, and all benefit that he could have derived under any part of the transaction, in question, within the rules of this court, and to subject him to the liability to restore the property to the party entitled to receive it. Who that party is, and in what right such party is to receive the property so to be restored remains to be considered.

The party aggrieved was Edward Bellamy, before these transactions first tenant in tail in remainder expectant upon his father's life estate. The plaintiff is Francis Bellamy, second tenant in tail in remainder, before the recovery suffered expectant upon the life *estate of the father, and the failure of [*437] the estate in tail in Edward. The plaintiff is also heir-at-law of Edward.

It was not disputed at the hearing that the heir-at-law of a

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person seized in fee might obtain a decree to set aside a fraudulent sale by the person so seized ; but it was said that Edward never was seized in fee, and that, as a remainderman, the plaintiff could not complain, because the recovery destroyed his remainder. If it was only intended to be argued that if a tenant in tail suffers a recovery intending to bar the entail, but is defrauded in some part of the transaction, independently of the object of barring the entail, a remainderman cannot complain, the proposition is, I conceive, correct ; but it amounts only to this, that a transaction may be good in part, and for certain purposes, though voidable for fraud as to other parts and as to other purposes, a proposition common to all transactions, impeachable for fraud, and by no means peculiar to those of which a recovery forms a part. If the proposition was intended to be carried further, it is, I think, not maintainable, and is by no means to be deduced from the authority cited in support of it, viz. *Tweddell v. Tweddell*.^(a) In the passage of Lord Eldon's judgment, relied upon for this purpose, he must be understood to mean only this, that whereas the first tenant in tail had the right without any consideration to convert the tenancy in tail into an absolute interest, a remainder-man in tail could not avail himself of an equity which, if the first tenant in tail ever had, he had directly, or impliedly elected not to enforce ; that this must have been Lord Eldon's meaning must be inferred from his putting the case of a remainder-man filing a bill in the lifetime of the first

[*438] *tenant in tail, founded upon a supposed equity in such first tenant in tail, and such first tenant in tail repudiating the equity, and insisting upon the settlement as effected by the recovery. He cannot be supposed to have intended to say that if an actual fraud had been practised upon the tenant in tail, which had been carried into effect by means of a recovery, and the tenant in tail had died without confirming the transaction, that the tenant in tail, next in remainder, could not maintain a bill to set aside the transaction. If that were the rule in equity it would be a singular instance of a fraud which this court could not reach. If the recovery and the fraud be so con-

(a) *Turn & Russ.* 12.

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nected as to exclude the possibility of separating the transaction, and the tenant in tail should die immediately afterwards, the author of the fraud would be secure in the enjoyment of its fruits: the heir-at-law would have no right to complain, because the party defrauded never had any estate which could descend to him as heir; the remainder-man alone would be the party injured. In *Englefield v. Englefield*,^(a) a similar objection was taken and overruled, the court observing that if a conveyance be obtained by fraud, it is the same thing in equity as if no conveyance had ever been made. In the view I take of this case, it will not be necessary for me to go further into this question, because I consider the plaintiff entitled to relief, not as remainder-man, but as heir to Edward.

I have before observed that even the same identical transaction may be good as to part, although voidable as to other parts. Of this *Bennett v. Vade*,^(b) is an instance. A party with a fraudulent intention of benefitting *himself, may, with *[439] that view, be instrumental in procuring an arrangement between parties to which no objection can be made. Suppose it was part of Mr. Sabine's plan to make an arrangement between the father and the son, in order that he might afterwards deal with the son, the motive would be most improper, but the arrangement between the father and the son would be to be judged of upon its own merits. So far as Mr. Sabine is concerned, the whole may be looked upon as one transaction, in order to judge of his motives, and to put a construction upon his acts; but as between parties, some of whom may be affected by one part of the transaction, but be total strangers to the other part, it is not only not necessary, but it would be unjust to consider every part of the transaction affected by objections which, in fact, apply only to particular portions of it.

Any person who thought he could obtain from the son whatever he might choose upon his own terms, might, for that reason, be anxious to procure the best possible terms for the son in the arrangement with his father. I do not say that such was the case here, but it certainly appears that Mr. Sabine did resist

(a) 1 Vern. 142.

(b) 2 Atk. 324.

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some attempts of the father to exact more severe terms than those ultimately agreed upon, and that the father, at one time, seemed disposed to abandon the whole scheme rather than acquiesce in what was proposed. It has often been decided that in such transactions between a father and son, the ordinary rules which are applied to the acts of strangers, are not to regulate the judgment of this court. In such cases apparent inadequacy of consideration, and the circumstance that the property is reversionary, have but little weight. Fraud will indeed vitiate these as well as all other transactions, but *arrangements between members of the same family to assist their several objects, or relieve their several necessities, are affected by so many peculiar considerations, and are influenced by so many different motives, that they have been wisely withdrawn from the influent of the ordinary rules by which this court is guided in adjudicating between other parties. The case of *Tweddell v. Tweddell* before referred to, and the authorities upon which it proceeded, establish this distinction.

In this case both father and son were greatly pressed by debts. The father had more than exhausted the value of his life estate, so that no stranger would have purchased it at the rate at which the son bought it; but the father had a power over his son which not only empowered but, perhaps, justified him in requiring a considerable consideration from him: without the concurrence of the father, the son's interest in the estate was unavailable for the purpose of relieving him from his wants, or of providing for his future subsistence. He had not a reversion secure upon the expiration of a life estate, but a chance of obtaining power over the estate; that chance being his surviving his father, a chance, by which, if he had trusted to it, he would have lost all benefit from the property. But the calculation of profit or loss constituted part only what must be supposed to have influenced the parties: neither father nor son had the power separately of making any provision for the mother and younger children of the family, which was to a certain degree effected by the arrangement. How far the son may have been influenced by each of these different objects, it is impossible to calculate, and it therefore becomes impossible to look at the

evidence of value as materially affecting the question. If the transactions had terminated with the arrangement with *the father, the son would have derived a considerable [*441] benefit from it, and it is, I think, proved that he could not have obtained that benefit at a less sacrifice than he paid. The terms were rather forced upon the father than the son.

One circumstance was much relied upon as showing, if not the fraud, at least the hurry and want of proper caution in completing this arrangement, namely, that the son is made to undertake for whatever might be due to Mr. Sabine upon his general account, and for his professional charges, these being left in blank in the agreement of 8th of June. This no doubt is a most extraordinary part of the case. Mr. Sabine says in his answer, that although the exact sums had not been ascertained, the parties knew nearly what they would amount to; of this there is no proof, but it is proved that the general account up to March 1827, had been long in the father's hands; and it is to be observed that a family arrangement of this description cannot be supposed to have depended upon any very exact calculation as to the amount of the debts.

Looking, therefore, to the facts as between the parties to the agreement of the 8th June, I do not find sufficient to entitle the plaintiff to be relieved from the consequence of that agreement; but being of opinion that the subsequent agreement of the 21st June cannot be supported, I must consider the recovery and the conveyance of the legal estate effectual only for the purpose of carrying the agreement of the 8th June into effect. Had this been the only object of the conveyance, the legal fee would have been vested in Edward Bellamy. It was conveyed to Mr. Sabine for the purpose of the agreement of the 21st, and that being set aside, Mr. *Sabine is to be considered as a [*442] trustee for the plaintiff as heir to Edward Bellamy.

It was contended, on the part of the personal representative of Edward Bellamy, that the heir is not entitled to this decree, because it would be depriving his personal estate of the money remaining due from Mr. Sabine, and that such a decree would be administering an equity as between representatives. Were this argument to prevail, the most fraudulent sale of a large es-

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tate for the smallest possible sum would be out of the reach of a court of equity to set it aside after the death of the party defrauded.

There is no such objection to the relief prayed by the heir, and the principle of there being no equity as between the real and personal representative, has no reference to a case of this kind, in which the court proceeds upon the ground, that as the transaction ought never to have taken place, so the rights of the parties are as far as possible to be placed in the situation in which they would have stood if there had never been any such transaction.

In setting aside sales of this kind the court considers the purchaser as in the situation of a mortgagee, so far as he has made payments in consequence of the sale. Such payments Mr. Sabine is entitled to be repaid. The usual account of such payments must be taken, and upon payment of what may be found due upon taking that account Mr. Sabine must be decreed to reconvey the estate to the plaintiff as heir of Edward Bellamy.

Mr. Sabine must pay the plaintiff's costs of the suit; but as the plaintiff gets no decree upon that part of the [*443] *case which made it necessary to bring the other defendant before the court, I do not think that he ought to pay the costs of the other defendants, except of the personal representative of Edward, whose costs he must, I think, pay: he by his answer having insisted that such personal representative ought to be a party.

It was accordingly decreed that the bill, so far as it sought to have the agreement of the 8th June and all such indentures as had been executed in pursuance thereof delivered up to be cancelled, should stand dismissed; and it was declared that the agreement of the 21st June, and the deeds executed by John and Edward Bellamy and Sabine in pursuance thereof were fraudulent, and ought to be delivered up to be cancelled, and it was so decreed accordingly; and after directing certain accounts of the sums paid or retained by Sabine under the agreement, and of rents received by him, it was ordered that on payment by the plaintiff to Sabine of the balance which should be found

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due to him on those accounts Sabine should convey to the plaintiff, or as he should appoint, the several estates comprised in the agreement of the 20th June, subject to the mortgages subsisting thereon at the date of that agreement, but free and clear of all incumbrances by Sabine, or those claiming under him.

SECOND SUIT.

While the taking the accounts under that decree was in progress in the Master's office, and, of course, before any conveyance had been made by Sabine to Francis Bellamy, John Bellamy instituted a new suit, complaining that Francis had not paid any of the sums or annuities which Edward had covenanted to pay by the agreement of the 8th June, and praying specific performance of that agreement so far as it remained un- [*444] performed, and consequential relief.

The bill rested the plaintiff's title to that relief upon the several transactions above detailed, including the decree in the former suit, as amounting to a complete performance, on his part, of the agreement of the 8th June; and it also charged, that having joined in the recovery, and in the conveyance of the estates to Sabine by the direction of Edward Bellamy, the plaintiff was entitled to a lien on the estates for the several sums of money and annuities, the payment of which he now claimed, with interest thereon.

Francis Bellamy, in his answer to that bill, relied on the same circumstances as evidence of fraud, on which he had insisted in his own suit, and particularly on an admission in the answer of John Bellamy in that suit, that the amounts of several of the debts, which Edward Bellamy undertook by the agreement of 8th June 1827 to pay, had been purposely left blank in the deed; and he insisted that if the court should be of opinion that the agreement ought to be specifically performed, he ought not to be decreed to pay or indemnify the plaintiff against the debts therein mentioned to any greater amount than the value of the plaintiff's original interest in the estate, after payment of the mortgages thereon.

At the hearing of the cause before Vice-Chancellor Knight

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Bruce, his Honor, after intimating an opinion that considering the account given of the transaction in the present plaintiff's answer in the former suit, and the provisions of the deed itself, it was impossible, even on the principles applicable to family arrangements, to decree specific performance of such an agreement (a decision which he observed would be not inconsistent *with the decree at the Rolls, inasmuch as it did not follow from the court having refused to set aside that contract at the instance of the son, that it would therefore lend its aid to enforce it at the instance of the father,) asked the counsel for the plaintiff whether they wished for leave to amend the bill by adding an alternative prayer,—that in the event of the court not decreeing specific performance of that agreement the plaintiff might be as far as possible placed in the same position as if that agreement had not existed, and might have proper relief on that footing. And on the plaintiff's counsel accepting that offer and the counsel for the defendant not desiring to put in any further answer, the hearing of the cause proceeded as if such amendment had been actually made.

By the decree ultimately pronounced by the Vice-Chancellor, it was declared, that having regard to the answer of the present plaintiff in the former suit, and to all the circumstances of the case, the plaintiff was not originally, and was not on the 21st of June 1827, entitled to a specific performance against Edward Bellamy of the agreement of the 8th June, 1827, and that unless the acts and conduct of the plaintiff Edward Bellamy, Sabine, and Francis Bellamy, or some or one of them, since the 21st June, 1827, had been such as to give the plaintiff a title to enforce the specific performance of the said agreement, he was not then entitled to a specific performance thereof; and it was referred to the Master to inquire and state to the court what, if any, receipts and payments, and to what amount respectively, and what acts had been had, made, and done by the plaintiffs Edward Bellamy, Sabine, and Francis Bellamy, or any, or either, and which of them, on the footing or in consequence of the said agreement, and at what time or times, and under what circumstances, *and what, if any, benefit had [*446] been derived, or detriment sustained, by the plaintiff, and

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Edward Bellamy, and Francis Bellamy, respectively, or any, or either, and which of them, by means, or in consequence of the said agreement; and further directions and costs were reserved.

From that decree the plaintiff appealed.

Mr. *Teed* and Mr. *Lambert* appeared for the appellant.

Mr. *Russell* and Mr. *Glasse* for Francis Bellamy.

Mr. *Js. Parker* and Mr. *Barber* for certain mortgagees under Sabine.

It was stated in the argument that the Vice-Chancellor had particularly adverted in his judgment to that part of the decree at the Rolls which directed Sabine to convey the estate to the present defendant, and had observed that he did not conceive that that direction interfered with the decree he was about to make, but that, as the point was not free from doubt, he recommended the plaintiff, if he appealed from the decree then about to be made, to appeal also from that at the Rolls, in order that the real question between the parties might come before the Lord Chancellor unembarrassed by any technical obstacle.

Nov. 8th.—THE LORD CHANCELLOR.—Before I proceed to consider the points in this case, which constitute the real contest between the parties, I think it right to advert to two matters forming part of the decree, which affect the [*447] general practice of the court.

The bill prays simply the execution of certain provisions of an agreement of the 8th of June 1827. No case was made, and no part of the prayer was addressed to the possible event of the court being of opinion that the plaintiff was not entitled to the relief he prayed, so as to reduce the plaintiff to the necessity of asking that so much of the agreement as had been performed on his part might be undone, and he thereby restored to the position in which he would have stood if he had never entered into it.

It appears from the decree appealed from, that the cause hav-

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ing been heard on this state of the pleadings, stood for judgment on the 5th of August 1844 when the court ordered, there being no application for that purpose, that the plaintiff should be at liberty to amend the bill by adding the following passage to the prayer : — “That in the event of the court not decreeing specific performance of the said agreement of the 8th of June 1827 &c., the plaintiff may be placed, as far as possible, in the same situation as if such agreement had not existed, and may have proper relief on that footing against all parties, the plaintiff undertaking to account and act in that case as the court shall direct.” And the decree recites, that the plaintiff accordingly amended his bill pursuant to the said order, and that the defendants by their counsel had stated, that they did not desire to put in any further answer to the plaintiff’s bill, or go into any further evidence in consequence of such amendment. There is not any recital of the defendant’s having consented to such an amendment being made, and they have not appealed ; and the plaintiff,

having adopted the permission given by making the [448] “amendment, could not, nor has he complained of it.

But observing this on the face of the decree, I thought it right to express my opinion, that such an alteration of the record and of the case made by the bill in the then stage of the cause, was a course which ought not to be adopted, and an example which ought not to be followed.

The rights of parties litigating in equity must be decided *secundum allegata et probata*. [1] Attempts to reach the supposed

[1] The rule is well settled that no proofs can be offered of facts not put in issue by the pleadings, nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence ; hence the necessity of putting in issue by the bill whatever is intended to be proved by the complainant in the cause, otherwise he will not be permitted to give it in evidence ; and that for this rule, that the court pronounces the decree *secundum allegata et probata* ; and this latter rule is based upon the ground that the adverse party is entitled to be apprised of the case intended to be made against him in order to prepare for his defence. *Cooper’s Pl. 7* ; *Welford’s Pl. 85* ; *Smith v. Clark*, 12 Ves. 481 ; *Crockett v. Lee*, 7 Wheat. 522 ; *Lyon v. Tallmadge*, 14 John. Ch. R. 587 ; *James v. McKerrion*, 6 John. R. 563 ; *Kelsey v. Western*, 2 Comstock R. 500. And this rule is equally applicable to a defence by way of answer. The defendant, besides answering the plaintiff’s case, as made by the bill, must state in his answer all the facts and circumstances which he intends to avail himself of by way of defence, and to apprise the plaintiff in an un-

equities by departing from the rules of the court, which have been established for the purpose of ascertaining and administering justice, generally lead to results in the particular cases, the reverse of what was intended, and introduce disorder, uncertainty, and confusion into the general practice of the court.

There is another part of this decree that calls for observation, as it adopts a course contrary to the established practice, which I think in this point it is essential to preserve. The bill rests the plaintiff's case on the agreement itself, and certain proceedings which followed it; and particularly the dealings between Edward the plaintiff's son, and the defendant Sabine, and the conveyance to Sabine under the direction of Edward, and the decree in the former suit by which Sabine was decreed to convey the property to Francis in fee, his title to which was founded solely upon the agreement of the 8th of June 1827. This put in issue the rights of the parties under the agreement, as it is affected by the subsequent transactions stated: and the court might with strict propriety have decreed in the plaintiff's favor on such subsequent proceedings, although it might have thought that his title under the agreement alone could not have been maintained. But the decree appealed from, after the declaration against the plaintiff's title under the agreement, [*449] takes no notice of the other grounds of the plaintiff's claim as stated in the bill, but gives a reference to the Master of the largest kind, as to any subsequent transactions which might give to the plaintiff a title to the relief he asks, notwithstanding the infirmity of his title, in the opinion of the court, upon the agreement itself. Under this reference, any matter though never alluded to in the pleadings, and though inconsistent with the case there made, must, if brought before the Master, and within the ample terms of the inquiry have been included in the report, and would, if thought available, have become the foundation of the decree. Any inquiry for the elucidation or further trial of matters in issue would have been consistent with the

ambiguous manner, of the nature of the case he intends to set up and he cannot avail himself of any matter in defence, not stated in his answer, even though it should appear in his evidence. *Stanley v. Robinson*, 1 Russ. & Mylne, 527; *Kelsey v. Weston*, 2 Camstock R. 500.

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practice of the court, but a reference to see whether the plaintiff may not have a case which he has not put forward or attempted to prove, is I conceive directly opposed to such practice. A decree founded upon the result of such an inquiry would not be *secundum allegata et probata*, but upon a case in which both these essentials were wanting.

The judgment which I am called upon to pronounce in this case does not proceed on either of these objections to the decree, but upon what constitutes the merits of the question between the parties. The decree proceeded in a great measure upon a well known rule of equity, that in many cases the court will refuse to interfere in case of contract. It will not set them aside, though it will refuse to perform them; it simply refuses to interfere, leaving the parties to such consequences as may follow from the legal rights which the contract may have given. This case is quite out of the influence of this rule. By refusing the relief

asked by this bill, the parties are not left to the legal rights [*450] which the contract may have given. The plaintiff

has performed his part of the contract, and has parted with the estate which by this very contract he agreed to sell. It is not a bill for a specific performance of an unexecuted contract, but for the enforcement of rights growing out of a completed sale; and not only is this the case, but it is a case under a decree which the defendant and Francis himself obtained. The decree of 1835, directed the conveyance of the estate to Francis in fee, to part of which but for that agreement he would be only heir in tail-male expectant on the plaintiff's life, and as to the other part of which he would have no title at all. But it is hardly necessary to consider this part of the case, because, in my opinion, the question was not open for discussion in the Vice-Chancellor Knight Bruce's Court. The decree at the Rolls concluded that question, for it not only refused to set aside the agreement of the 8th of July 1827, but directed it to be specifically performed, for that was necessarily involved in that decree. Edward, who had become entitled to the fee under the agreement, had caused it to be conveyed to Sabine, the present plaintiff, his father, having joined with him in the recovery for that purpose; and when he, having succeeded in obtaining the decree against Sabine, took

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from the court a direction to convey the fee to himself, he waived any equities he might have had to object to the agreement under which alone his title to the fee arose. He could not, as the Scotch lawyers express it, at the same time approbate and reprobate the agreement: he could not adopt it for the purpose of procuring the fee of the plaintiff's land, and repudiate it when the plaintiff applied for those rights which, by the agreement, were attached to, and were to grow out of that fee; he could not take the land he purchased and refuse to pay the purchase money.

*The learned judge, whose decree is under review, [*451] seems to have felt the weight of this difficulty, as he repeatedly and strongly urged the parties to appeal from the decree at the Rolls. They have not taken that advice and their rights must be adjudicated upon as affected by that decree. I must, however, observe, that, had they appealed from that decree and had that decree upon such appeal been thought to be erroneous, the Vice-Chancellor's decree would not have been set up or aided by its reversal; because, as it was a binding decree at the time of the making of the present decree, the court was bound by it, and ought not to have made any decree inconsistent with it.

The decree at the Rolls, adopting the agreement of the 8th July 1827, gives to Francis the estate to which it refers. The decree under review by dismissing the bill as to part and directing inquiries which may lead to a total dismissal, assumes that Francis may remain in possession of the fee without paying the purchase-money or performing the conditions upon which he purchased, or if the court should ultimately do what it has made the plaintiff ask by the amendment, it would by its decree, direct the estate to be conveyed to the purposes for which it was held, before the agreement. The decree at the Rolls, having directed that it should be conveyed and held for the purpose to which it was destined under the agreement, if the Vice-Chancellor Knight Bruce had acted upon the opinion which he seems to have entertained, that the decree at the Rolls was a bar to that which he thought the justice of the case required he would, I think, have adopted a course which could not have been questioned.

I have no doubt but that the decree at the Rolls of itself

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[*452] prevents the decree now appealed from being *affirmed ; but I must add that nothing has been urged before me, or has occurred to my mind in reviewing the case at the Rolls and reading the written judgment I then pronounced to raise any doubt but that the rights of the parties were properly settled by that decree, and that the parties acted wisely in abstaining from opening it. The result is that the decree appealed from must be reversed, and a decree made for what the plaintiff asks, so far as relates to his own claims.

I am not sure that I rightly collect the position of the defendants who are made parties as mortgagees ; but the decree at the Rolls seems to deal correctly with them. The conveyance by Sabine must be decreed to be subject to such charges as affected the estate at the date of the agreement of June 1827, but free and clear from all done by him or any claiming under him. If all these mortgagees come under the latter description, whether by new charges, or by taking the legal estate to improve former incumbrances, they must remain before the court.

[*453]

*PARKER v. MORRELL.

1846: Dec. 18. 1847: Jan. 19. 1848: Jan. 27.

Every decree, although it only direct issues or inquiries, ought to recite the evidence on which it is founded, and therefore, where evidence is tendered and objected to, the court ought to decide at once upon its admissibility, and not to allow it to be entered as read *de bene esse*.

An answer put in by one of several partners, after dissolution of the partnership, containing an admission of a representation having been made by such partner in a partnership transaction, prior to the dissolution. Held not to be admissible as evidence of such admission against his co-partners, on the ground that since the dissolution of the partnership the party whose answer it was had become bankrupt and obtained his certificate, and had therefore at the time of putting in the answer no common liability with the co-partners. Held also that even independently of that objection, such answer would not have been admissible in evidence, though made in the existing suit, without other evidence to identify the party whose answer it was with the partner.

An issue, whether a security had been "unfairly" obtained, superadded to an issue, whether it had been "fraudulently" obtained, disapproved ; from the uncertainty

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of what, in a legal sense, constitutes unfairness as distinguished, if it be distinguishable, from fraud.

The practice of allowing the parties, on the trial of an issue, to be examined for themselves is in the discretion of the court, but to be resorted to with great caution, and never unless, under the peculiar circumstances of the case, justice could not be attained without it; and certainly never, when, from the position of the parties, an unfair advantage would be given by it to one over the other. And, therefore, where it appeared that the transaction to which the issue related, had occurred in the presence only of the plaintiff and one other party, who, being a late partner of the defendants, was since dead; an order of the court below directing that each party to the issue should be at liberty to be examined for himself, was reversed on appeal as calculated to give the plaintiff an unfair advantage.

Where, after the trial of an issue directed by the court below, the party who failed appealed from the order directing it, the Lord Chancellor in reversing the order and directing a new issue, refused the other party the costs of the appeal, but reserved them.

Where a decree or order under which money has been paid is reversed on appeal the money is in general ordered to be repaid without interest.

THE object of this suit was, amongst other things, to have it declared that a bond and warrant of attorney, dated the 30th of April 1831, were fraudulently obtained by the defendants from the plaintiff, and to have a sum of £1560 14s. which the plaintiff had paid to the defendants in respect thereof before the discovery of the alleged fraud, repaid with interest; and also that an action which the defendant had brought against the plaintiff upon another bond dated the 30th January 1822, which was also alleged to have been fraudulently obtained, might be restrained by injunction.

*The case made by the bill, so far as is material to this [*454] report, was—That in the year 1822, and for many years afterwards, Richard Parker, the brother of the plaintiff, carried on the business of a common carrier and corn-dealer, and kept an account with the banking firm of Cox, Morrell & Co., at Oxford; in which firm the then partners were Richard Cox, his son Richard Ferdinand Cox, and the defendants James and Robert Morrell. That, at the beginning of the year 1822, Richard Parker represented to the plaintiff that he had occasion for the sum of £2000 for a few months, and that the bankers would give him credit for it in his account, if the plaintiff would join him as surety in a bond for the amount; which the plaintiff having consented to do, the bond of the 30th January 1822, was

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accordingly executed as the joint and several bond of the two brothers.

That in the month of April 1831, Richard Ferdinand Cox who was an intimate friend of Richard Parker, called upon the plaintiff and informed him that Richard Parker was in want of £2500 and had applied to the bank to advance him that amount, which they were willing to do upon having security, and that he, R. F. Cox, was commissioned by Richard Parker to request the plaintiff to become such security. That upon the plaintiff expressing some surprise that the bank should require security from so old and well known a customer as his brother, R. F. Cox replied that it was a rule of the bank not to allow their customer's accounts to be overdrawn without some security being given; but that he had perfect confidence in the flourishing state of Richard Parker's affairs; and, after reminding the plaintiff that he had been borne harmless upon his former bond, he added, that if the plaintiff had really any apprehension he would himself engage to replace the loan in three weeks, [*455] should Richard Parker fail to do so; whereupon *the plaintiff, relying upon that assurance, consented to give his security, and accordingly executed the bond and warrant of attorney above mentioned, of the 30th April 1831.

That in the following month of June, R. F. Cox, quitted the banking firm, on which occasion the plaintiff having heard that cash matters between him and his partners were not quite correct, and that Richard Parker was to be a party to some arrangement on his behalf with the firm, the plaintiff became anxious that the bond and warrant of attorney which he then supposed to be the only securities in the hands of the bank on which he was liable, should be withdrawn, and that, upon his intimating such wish to Richard, the latter went with him to the bank and paid 1000*l.* specifically in part discharge of the 2500*l.*: and that in the year 1838, the plaintiff was compelled by a threat of proceedings on the bond and warrant of attorney to pay the 1560*l.* 14*s.* being the balance of that sum with an arrear of interest then claimed to be due.

That, in the following year, to the plaintiff's great surprise, the above-mentioned action was brought against him by the

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Morrells and certain persons as assignees of R. F. Cox, who had in the year 1838, become bankrupt, upon the bond of April 1822; and that from inquiries which those proceedings had induced him to make, he had discovered that both the security of 1822 and that of 1831 had been obtained from him under circumstances of misrepresentation and concealment as to the state of Richard Parker's banking account; for that, while he had been led by Richard F. Cox to believe on both those occasions, that the account was not overdrawn, and that the securities were wanted only for a temporary and particular advance, the fact was, that Richard *Parker's account was, on [*456] both occasions, overdrawn by several thousand pounds independently of the advances for which the securities were understood to be given, and that his affairs were known by the bank to be in a state of embarrassment.

The defendants, the Morrells, by their answer insisted that the bonds were intended to be permanent and continuing securities; but they admitted that, at the time when the bond of April 1831 was given, Richard Parker was largely indebted to the bank; and that, although the defendants were not then aware of the full amount of such debt, inasmuch as Richard F. Cox, who had had some irregular dealings with Richard Parker, had made him some advances which he had contrived to conceal from his partners, yet that the defendants were then anxious to obtain some further security for payment of the sum by which they knew that the account was overdrawn, and which the books then showed to be 4275*l.*; but they said that the whole transaction connected with those securities had been conducted by Richard F. Cox alone, and that they did not know what passed on the occasion between him and the plaintiff; but that if he had made any such representations as the bill alleged, they, the defendants, were not in any way privy thereto; and with respect to the alleged suppression of information on the part of Richard F. Cox, they said it was not the practice of their bank, or indeed of any bank, to disclose the state of their customers' accounts to a stranger, without express authority from the customer himself.

Richard F. Cox, who, though stripped of all personal interest

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[THE LORD CHANCELLOR.—It is not easy to see what is the utility of such an issue. If the preceding issues be found for the plaintiff, there is unfairness, and a good deal more. If not, and by unfairness be meant something different from fraud in the legal sense, what does it mean? It is easy to say morally what is unfairness, but not legally. Such an issue is certainly not according to the usual practice of the court.]

But the most serious objection to the order is the leave given to the parties to be examined for themselves, the effect of which in this case has been, that the plaintiff has obtained verdicts upon his own evidence only, and that upon facts which not being in the knowledge of the appellants, they were unable by their own evidence to contradict. The only other case [*460] in which we *believe such a course has ever been adopted is that of *Milner v. Singleton* some years ago, in which, however, the circumstances were very peculiar; for the question being whether a lease granted to Singleton had been so granted to him in trust for Milner, and that question depending entirely on what had passed between them in a private room when no one else was present, your Lordship thought it desirable that the jury should see what the parties would say when confronted together. In that case, therefore, the course seems to have been justified by necessity, and both parties were on an equality. But in the present case both these features are wanting, for if there was, as the plaintiff alleges, fraudulent concealment, he had other means in abundance of proving it, and then the question of misrepresentation would have been immaterial. If, on the other hand, the case rested on misrepresentation alone, the parties were not as to that on an equality, for the only person who could have contradicted the plaintiff's assertion on that point was dead.

THE LORD CHANCELLOR.—I never before heard of such a thing being done where there were two parties to the transaction in question, and one was dead. But it is not an unfrequent practice where both are living. I remember in *De Tastet v. Bordenave*, Lord Eldon ordered both parties to be examined.

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Mr. *Russell*, Mr. *Walker*, and Mr. *Goodeve* for the respondents.

If any party is entitled to complain of the decree, it is the plaintiff, who, we are prepared to contend, was entitled upon the pleadings to an immediate decree.

*THE LORD CHANCELLOR.—You cannot go into that [*461] on this appeal, which is only from part of the decree. It assumes that some issue is to be directed, and merely brings before me the question whether the issues ought not to have been sent in some other form, and with different directions. If you meant to complain of the decree, you ought to have appealed generally.

After some further discussion, the counsel for the appellant not objecting, the case stood over, with liberty to the plaintiff to present such counter-petition as he might be advised, he paying the costs of the day.

Jan. 19.—No counter-petition of appeal, however, was presented, and the counsel for the respondent on a subsequent day resumed their argument: attempting to sustain the issues as directed by the court below. For that purpose they argued, that on the authority of *Pritchard v. Draper*,^(a) and *Cass v. Bedingfield*,^(b) Cox's answer was admissible against the defendants, as the admission of a *quondam* partner of theirs in relation to a partnership transaction: and that even, supposing it not to be as conclusive as an admission by the defendants themselves, it was sufficient ground on which the court might direct an inquiry. With respect to the direction that the parties should be at liberty to be examined, they referred to *De Tastet v. Bordenave*,^(c) and Seton on Decrees, p. 346; but lastly, they insisted *that after the trial of an issue, it was too late [*462] for the unsuccessful party to appeal against the order directing it, *De Tastet v. Bordenave*, particularly where, as in

(a) 1 R. & M. 191.

(b) 12 Sim. 35.

(c) Jac. 516.

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this case, that party had not been merely passive under the order, but had applied, before the trial, for a special jury.

Mr. *Wigram*, in reply to the last point, cited *White v. Lisle*,^(a) and mentioned, as analogous, the recent case of *Watts v. Hyde*,^(b) in which the defendant, after having tried his chance upon the amended record, had been permitted to appeal from the order allowing the amendment.^(c)

Jan. 27.—THE LORD CHANCELLOR.—This case involves two points of much importance to the practice of the court; but neither of them, in my opinion, of any doubt.

The decree contains the following recital as one of the grounds upon which it is founded: "And upon hearing the answer of Richard Ferdinand Cox to the plaintiff's original and amended bill, tendered by the plaintiff as evidence against the defendants James and Robert Morrell, but objected to by them, and read *de bene esse*, without prejudice to the question whether the same be admissible in evidence against the defendants James and Robert Morrell or not, read." The decree, therefore, imports that it was made upon hearing this answer read against the other [463] defendants; but it cannot be supposed that the court permitted such answer to have any effect upon its judgment without deciding whether it was admissible or not as evidence. I have lately had several opportunities of stating my objection to this course of proceeding, which it is therefore unnecessary to repeat upon the present occasion.^(d) When a piece of evidence is tendered and objected to, it is, I think, the duty of the court, before it makes a decree, to decide upon the admissibility of the evidence; and I have no hesitation in the present case in holding, that when this answer was tendered it ought to have been altogether rejected.

It was as I understand, simply tendered as an answer in the cause, that is, an office copy was produced as the answer of one Richard Ferdinand Cox: that is, the answer of one defendant was attempted to be read against another defendant, which is

(a) 3 Swanst. 351, n.

(b) P. 406, ante.

(c) See *Butlin v. Masters*, ante, p. 290. (d) See *Watson v. Parker*, ante, p. 5.

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contrary to the rules and practice of this court. The decree recites that it was tendered as evidence: but that does not negative the supposition that it was tendered as an answer in the cause. It cannot mean that it was tendered as a document of a person whose admissions would be evidence against the defendants James and Robert Morrell, because there does not appear to have been any evidence to introduce the document in that character. The identity of the party, his relative situation with respect to the other defendants, and the authenticity of what appears in that answer as being his admissions, all essential circumstances to the validity of the document as a piece of evidence, not appearing *aliunde*, cannot be proved by the contents of the document tendered and objected to. Without, therefore, entering further into the question, I think it clear that "as the matter was presented to the Court, this document ought to have been rejected. [*464]

I must, however, observe, that as to the question whether such a document could, if regularly brought before the court, have been received in evidence, none of the cases referred to come near to the circumstances of the present. *Prichard v. Draper*(a) is the nearest; but this proceeded upon a ground which is wanting here, namely, that the party making the admission was at the time subject to a joint obligation(b)[1] with the party

(a) 1 R. & M. 191.

(b) There seems to be some inaccuracy of expression in this reference to the case of *Pritchard v. Draper*, which, however, as the judgment was a written one, the reporter has not felt himself at liberty to alter. The bill was filed by one of two partners in a dissolved firm, against a debtor to the partnership, for an account and payment of a partnership debt; and the other partner, who had since the dissolution of the partnership been employed as receiver of the rents of the debtor, was made a co-defendant with him. In taking the accounts before the Master that partner was examined on interrogatories, and his examination contained what Sir J. Leach thought was an admission, that the debt had been paid by an express appropriation of sums which had come to his hands in his character of receiver: and the question was whether that admission was made binding upon the plaintiff. Sir John Leach thought it was, and Lord Brougham was of the same opinion upon the question of law, but differed from his Honor upon the facts, being of opinion that the examination did not amount to such admission. The case, therefore, would seem to have been one, not of joint liability but of joint interest, though the reasoning of the judgment was bor-

[1] See *Wool v. Braddick*, 1 Taunt. 104; *Beitz v. Fuller*, 2 Douglass, 652.

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[*465] against *whom it was to be used : which appears from the ground upon which Lord Brougham rested that de-

rowed from the cases of *Whitcomb v. Whiting*, and *Wood v. Braddick*, which were cases of the former description, and, it is, no doubt, to that reasoning and not to the facts of the case of *Pritchard v. Draper* itself, that the Lord Chancellor's observation in the text refers.

It may be observed, however, as an additional ground for the rejection of the answer in the present case, that in all those cases at law in which an admission or acknowledgment by one partner after dissolution of the partnership has been held binding on his co-partners, the question has been whether a partnership contract, proved *aliunde* to have once existed, had been satisfied or discharged, or whether it was still subsisting : whereas, in the present case, the answer was tendered as evidence of the contract itself ; for it was tendered as an admission of a representation having been made by one of the partners, which if made, would have had the effect of a guarantee by the partnership that the facts represented were true. (See *Blair v. Bromley*, ante, p. 354.) It is, however, one thing to say that the continuing unity of interest and liability between partners in respect of contracts admitted or proved to have been subsisting at or previously to the dissolution of the partnership, shall render the subsequent acts or admissions of each partner in relation to those contracts binding upon the rest ; but it is another thing to say, that their subsequent acts and admissions should have the same effect in relation to contracts not otherwise proved to have been subsisting at or previously to the time of such dissolution. See Lord Ellenborough's observations on *Whitcomb v. Whiting* in *Brandram v. Wharton*, 1 B. & Ald. 467.[2]

[2] An apparent joint interest is not sufficient to render the admission of one party receivable against his companion, where the reality of that interest is the point in controversy ; the proof must first show *prima facie* the existence of the joint interest ; see, *Gray v. Palmer*, 1 Esp. 135. Where parties are sought to be charged as partners, the existence of the partnership cannot be proven by the admission of one so as to affect the others, see *Nicholl v. Dowding. et al.*, Starkey R. 81 ; *Grant v. Jackson et al.*, Peake Cas. 204 ; *Burgess v. Lane et al.*, 3 Greenleaf R., 165 ; *Whitney v. Ferris*, 10 John R. 66 ; *Van Reimsdyk v. Kane*, 1 Gall. 645 ; *Harris v. Wilson* 7 Wen. R. 57. The case of *Whitcomb v. Whiting*, was in conflict with the previous decision of *Bland v. Hoselrig*, 2 Ventris, and although it has been questioned in England (see *Atkins v. Tredgold*, 2 B. & C. 23,) but the weight of Lord Mansfield's name has successfully caused the doctrine of the case of *Whitcomb v. Whiting* to be fully established in England. It has been disregarded in the Supreme Court of the United States, (*Bell v. Morrison*, 1 Peters, 351,) and is now completely overruled in the state of New York. A review of the New York cases will be found in the opinion of Bronson, J. in the case of *Van Buren v. Parmelee*, 2 Comstock R., at page 529, 530, 531. The rule in that state as now settled by the Court of Appeals, is, that the presumed agency growing out of the contract of co-partnership, ceases on the dissolution of the co-partnership. The dissolution operates as a revocation of the authority, except so far as its continued existence is indispensable in winding up the

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cision, namely decisions at law under the then statutes of limitations, that one of the two parties bound, might, by his declaration or promise, after the statute had run, take the case out of its operation; the effect of the statutes of limitations being not that the right was destroyed by the running of time, but only that the remedy was barred. In the present case, Richard Ferdinand Cox, the late partner with Messrs. Morrell, became bankrupt in 1838, and obtained his certificate; and he was made a defendant, not as having been a partner, but as representative of his father, Richard Cox. By his answer he disclaimed any interest in the matters in contest, and was, therefore, when the bill was filed in 1840, and certainly till May 1845, when he answered the supplemental bill, and, for anything that appeared, at the time of the hearing, a competent witness to prove any fact the plaintiff might wish to *establish by him. [*466] But, abstaining from this regular and legitimate course, the plaintiff merely tendered an office copy of his answer, put

concerns of the company; and hence, after the dissolution of the co-partnership an acknowledgment and promise to pay made by one of the partners, after a debt is barred by the statute of limitations will not revive the debt

The case of *Whitcomb v. Whiting* has been followed in Massachusetts, Connecticut, Maine, and Vermont; see *Cady v. Shepherd*, 11 Pick. 400; *Bridge v. Gay*, 14 Pick. 55; *Sigourney v. Drury*, Ibid. 387, 391; *Verial v. Burrill*, 16 Pick. R. 401; *Bond v. Lathrop*, 4 Conn. 336; *Court v. Tracey*, 8 Conn. 268; *Austin v. Bostwick*, 9 Conn. 496; *Clarke v. Sigourney*, 17 Conn. 511; *Parker v. Merrill*, 6 Greenleaf, 41; *Pike v. Warren*, 15 Maine, 390; *Dinmore v. Dinmore*, 21 Ibid. 433; *Joslyn v. Smith*, 13 Vermont, 358; *Wheeler v. Doolittle*, 18 Vt. 440.

In North Carolina it has been held that the acknowledgment of a debt by one partner, though after the dissolution, will prevent the operation of the statute of limitations; (*McIntyre v. Oliver*, 2 Hawks 209;) and the same has been held in Georgia, provided the new promise is made before the action is barred; but not when the new promise is made afterward. *Brewster v. Hardeman*, Dudley, 138. It has been decided by the Court of Appeals in South Carolina, that a promise by one partner made after the dissolution, and after the statute had run, will not charge the other partner. *Steele v. Jennings*, 1 McMullen, 297. The authority of *Whitcomb v. Whiting*, has been denied in New Hampshire: *Exeter Bank v. Sullivan*, 6 N. Hamp. R. 124. In Tennessee, a promise by one partner after the dissolution of the partnership to pay a note made by the firm, does not take the case out of the statute of limitations as to the other partners, *Belote's Ex'rs. v. Wynne*, 7 Yerger, 534; *Muse v. Donelson*, 2 Humph. 166; and the same rule obtains in Pennsylvania and Indiana, *Levy v. Cade*, 17 S. & R. 124; *Learight v. Craighead*, 1 Pen. & Nott. 135; *Yande v. Lefasewar*, 2 Black. R. 371; see also *Bell v. Morrison*, 1 Fet. R. 367.

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in many years after all his connexion with the other defendants had ceased, and when he had no interest in, or liability connected with, any of the objects of the suit. If upon the trial of the issue I am about to direct, this answer should be tendered in evidence, its admissibility will be decided upon as the facts and the law may then appear to the presiding judge. I am only considering what, in my opinion, ought to have been done at the hearing in this court, and I am clearly of opinion that, as then tendered, it ought to have been rejected.

The next part of the decree to which I think it necessary particularly to advert, is the direction that at the trial the plaintiff is to be at liberty to be examined for himself, and that the defendants James and Robert Morrell are to be at liberty to be examined for themselves. The course which this court sometimes adopts of endeavoring to ascertain the truth by means inconsistent with the ordinary rules of evidence, have no doubt frequently been productive of good; but I think it ought to be resorted to with great caution, and never adopted unless, under the peculiar circumstances of the case, justice could not be attained without it: and certainly never, when from the position of the parties an unfair advantage would be given to another party.

In this case I find from the statement in the plaintiff's bill, that all the transactions complained of, and from which fraud is imputed, took place between the plaintiff himself and Richard Ferdinand Cox. The defendants, the Morrells, the partners with the latter, are not alleged to have intervened in any part of the transactions which are objected to, and appear to have [*467] *been not only not parties to the alleged misconduct of Richard Ferdinand Cox, but to have been themselves victims of the improper dealings with Richard Parker the plaintiff's brother. Richard Ferdinand Cox is alleged to be dead; but till the time of his death, which must have been after May 1845, he might have been examined by the plaintiff in proof of his case. This he neglected to do, and if by this neglect he has lost the benefit of his evidence the fault rests with him, but that can be no reason for giving him permission to prove his own case as a witness; and if it had, such permission ought only to have been given by putting the defendant upon a par with him, and

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this the decree proposes to do ; but the bill shows that this equality is nominal only, all the facts alleged being in the knowledge of the plaintiff, and none of them in the knowledge of the defendants, so that they could not possibly have any means of contradicting or explaining what the plaintiff might state to have passed between him and Richard Ferdinand Cox. This has not been so in any of the cases in which such orders have been made. In *De Tastet v. Bordenave*, both plaintiff and defendant were parties to the whole of the transaction in question, and there were no other means of ascertaining what they really were. I think, therefore, that the order for the examination of the plaintiff gave him a very unfair advantage over the defendants, and that this departure from the usual course of ascertaining the truth was calculated not to promote the object, but to lead to the opposite result. I am, therefore, of opinion that this part of the decree ought not to have been made.

The question remains what ought to have been the decree. The petition of appeal did not suggest that the bill ought to have been dismissed, but that a different *issue ought [*468] to have been directed, and certainly the state of Richard Parker's account with the firm, and his transactions with Richard Ferdinand Cox furnish a case for investigation. The appellant contended, that there was no case for any inquiry as to positive misrepresentations but only as to concealment, but the *suggestio falsi* and the *suppressio veri* may be closely allied, and the distinction between them very nice. I am, therefore, unwilling to limit the inquiry, and I think the issue should be whether the bond and warrant of attorney dated the 30th of April 1831, in the pleadings mentioned, were fraudulently obtained from the plaintiff by means of any false representation or improper concealment on the part of the four obligees or any of them, with liberty to endorse special circumstances. I see no case made for the fifth issue. The effect of the securities must depend upon their construction.

Mr. *Walker*, for the plaintiff, asked for the costs, on the ground that the defendants ought to have appealed before the issues had been tried, but

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THE LORD CHANCELLOR said—I cannot do that: all I can do is to reserve the costs.

Feb. 19.—The cause was afterwards spoken to on the minutes, when a question arose whether the 1560*l.* which had been paid by the defendants to the plaintiff pursuant to the decree below, should be repaid with or without interest.

THE LORD CHANCELLOR desired the Registrar to inquire whether there was any settled practice in such cases; and on a subsequent day,

[*469] *His Lordship said—The Registrars report that, in the absence of any special direction from the court, they should not insert payment of interest in the order. Now, no special direction was given by me in this case, and no special case for interest is now made; therefore let the order be for payment of the 1560*l.* without interest.

The Reporter has been informed that the issue has been since tried; that the answer of R. F. Cox was again tendered by the plaintiff, but was rejected; and that a verdict was given for the defendants.

COTHER v. THE MIDLAND RAILWAY COMPANY.

1847; Nov. 11, 12. 1848; Jan. 29:

Question, whether under the words "Railway and works," a railway company had a right, by the compulsory powers of their Act, to take a piece of land for the purpose of building a station. Held that they had.

Where the matter in dispute is distinctly raised by a motion for an injunction, and is ready for decision, the right should be declared and the injunction founded upon such declaration, that the order may inform the defendant what the opinion of the court is as to the limits of his right.

THIS was a motion to dissolve an injunction, granted by Vice-Chancellor Wigram, by which the defendants were restrained "from issuing a warrant to the sheriff to summon a jury, for the

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purpose of determining the amount of compensation to be paid by the Company for a piece of the plaintiff's land, consisting of 1a. Or. 38p." which they claimed a right to take under the compulsory powers of their Act, "and from entering upon, *or taking possession of the same, except so much of it [*470] as was necessary for the purpose of making or maintaining the railway and works."

The piece of land was used by the plaintiff as a rope walk, and there were several cottages and sheds built upon it. The company had given the usual notice to the plaintiff, that they required the whole; and had offered 800*l.* for it. The plaintiff disputed their right to take more than a small part, under the compulsory powers of their Acts, but had offered to sell them the whole for 1500*l.*

The Act of Parliament, under which the land was claimed by the company, empowered them to make certain lines of railway, including an extension of the main line of the Birmingham and Gloucester Railway, which had been consolidated with the Midland Railway, to the High Orchard Basin of the Gloucester and Berkley Canal at Gloucester; and it was for the purpose of that extension, and the works connected with it, that the land in question was required. The maps and plans deposited with the Clerk of the Peace, showed that two small portions only of the land, at the northern and southern extremities, were wanted for the extension line itself; but the whole was numbered, and the company insisted that the rest was necessary for other purposes, and amongst others, for the erection of a new station, or an addition to the old one, at the terminus of the original line; and also for sidings on which the waggons employed in the conveyance of goods from the terminus to the basin might wait until there was a sufficient number of them to form a train.

At the hearing of the appeal motion, it was stated that the Vice-Chancellor had granted the injunction on *the [*471] ground that, in his opinion, the act only authorized the substitution of a railway for the former carriage communication between the terminus of the original line and the basin, and that that authority did not carry with it a power to take land for the purpose of an additional station, that being a purpose which was

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always expressed, either directly, or by interpretation, in every Railway Act in which it was contemplated.

The material provisions of the special act, which incorporated the whole of the Lands Clauses Consolidation Act, and certain portions of the Railway Clauses Consolidation Act, including those which relate to the construction of railways and works connected therewith, are referred to in the judgment.

Mr. Js. Parker and *Mr. Willcock* appeared in support of the motion.

Mr. Romilly and *Mr. Bates, contra.*

Jan. 28.—THE LORD CHANCELLOR.—The injunction sought to be discharged restrains the company from taking and using any more of the land of the plaintiffs than is necessary for the purpose of making and maintaining the railway and works authorized to be made thereon by the act. It is by virtue of the act only that they were authorized to take any part of the plaintiff's land; the injunction therefore only prohibits the company from doing what they have no authority to do, without informing them what are the limits of such authority. That is leaving the question between the parties undecided, but to be discussed upon a motion for breach of the injunction. I do not believe [*472] that the Vice-Chancellor intended that the injunction should be in this form, for he decided the question; and this appears to be a very objectionable form of order, and one of which I have taken frequent opportunities of expressing my disapprobation.

There are, perhaps, cases in which this cannot be avoided; but when the matter in dispute is distinctly raised, and is ready for decision, I think the right should be declared, and the injunction founded upon such declaration, that the order may inform the defendant what the opinion of the court is as to the limits of his right, and not expose him, in the exercise of such right, to the consequences of violating so vague an injunction.

The question between these parties is very simple. The piece of land sought to be taken from the plaintiff by the com-

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pany is described in the map, plan, and book of reference deposited with the clerk of the peace; and the act of the company, after describing the line of railway, authorizes the company to make and maintain the railway and works thereby authorized, in the line, and in the manner after provided; and after reciting the deposit of the plan, section, and books of reference, authorizes the company to make and maintain the railway and works in the line and upon the lands delineated upon the said plans, and described in the said book of reference, and to enter upon, take, and use such of the said lands as shall be necessary for such purpose.

The plaintiffs do not dispute the right of the defendants to take so much of this piece of land as may be required for forming the line of railway, but deny their right to take any part which exceeds what is wanted for *that purpose, [*473] although required by the company for the purposes of the railway, in forming or enlarging a station, and in forming places for carriages to collect and wait till the trains are ready to start, no part of which they contend is authorized by the act: and that is the whole question; which must be decided by the words of the act, with the interpretation of such words either in the interpretation clause or by the provisions of the act, or of the Railway Clauses Consolidation Act.

The authority is, to take and use so much of the land in question as shall be necessary for the purpose of making and maintaining the said railway and works.

The Railway Clauses Consolidation Act, in the 3d section, declares that the expression "Railway" shall mean the railway and works by the special act authorized to be constructed; and the 16th section declares that it shall be lawful for the company for the purpose of constructing the railway, amongst other things, to erect and construct such houses, warehouses, offices, and other buildings, yards, stations, wharfs, engines, machinery, apparatus, and other works and conveniences as they may think proper; and the 45th section authorizes the company, in addition to the lands authorized to be compulsorily taken by them, to purchase, adjoining or near the railway, a certain extent of land for extraordinary purposes, and for the purpose of making

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and providing additional stations, yards, wharfs and places, for the accommodation of passengers, and for receiving, depositing, loading or unloading goods, or cattle to be conveyed upon the railway, and for the erection of weighing-machines, toll-houses, offices, warehouses, and other buildings and conveniences: and the quantity of lands to be purchased for such extraor-
 [*474] dinary purposes "is by the 10th section of the special act not to exceed ten acres.

There are no more distinct provisions in the special act or in the Railway Clauses Consolidation Act authorizing the formation of stations or other buildings and conveniences which are essential to the working of all railways; and if these provisions do not include such a power, parliament has authorized the extension of the railway in a manner likely to produce a great increase of traffic without any power to make those arrangements which such additional traffic will render indispensable. It seems to me, however, sufficiently clear that these provisions do include ample power for these purposes. The term "Railway" by itself includes all works authorized to be constructed; and for the purpose of constructing the railway the company are authorized to construct such stations, and other works, as they may think proper; and assuming that the lands authorized to be compulsorily taken would be taken and used for all ordinary stations and works, the act provides that, for extraordinary purposes, such as additional stations and conveniences, this railway may purchase certain additional quantities of land. I consider that all land, authorized to be taken as necessary, in the terms of the act, for the purpose of making and maintaining the railway and works, is liable to be so taken, whether necessary for the actual line of the railway, or for stations or other conveniences necessary for the working of the railway; and the purposes for which the plaintiff's land is proposed to be applied, clearly fall within that description.

Such, indeed, appears to have been the construction
 [*475] assumed and adopted in several cases. If, in the cases of *Eton College v. Great Western Railway*,^(a) and

(a) 1 Rail. Ca. 200.

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Lord Petre v. Eastern Counties Railway,^(a) the company could not have formed stations without special authority, what was the necessity of introducing special prohibitions, and why were the judgments of the courts confined to such special prohibitions, when, according to the plaintiff's argument, the companies would, for want of special authority, have been incompetent to contract such stations? The motion for the injunction must, I think, be refused with costs.

SKERRATT v. NORTH STAFFORDSHIRE RAILWAY COMPANY.

1848: Jan. 20.

The three months allowed by 8 Vict. c. 18, s. 23, to "the arbitrators or their umpire" for making their award, is not one and the same period, but the umpire has a new period of three months for making his award, from the time when the arbitration devolves upon him.

THE principal question, in this case, turned upon the construction of the 23d section of the Lands Clauses Consolidation Act,^(b) by which it is provided that "if when the matter," (*i. e.* the amount of compensation to be paid by a railway company for land required for their undertaking) "shall have been referred to arbitration, the arbitrators, or their umpire shall, for three months have failed to make their or his award, or if no final award shall be made, the question of such compensation shall be settled by the verdict of a jury."

Each party had, in this case, nominated an arbitrator, the last nomination being on the 9th March, 1847, and the arbitrators had duly appointed an umpire, on whom, they being unable to agree, the arbitration "ultimately devolved. [⁴⁷⁶] The time for making the award was not extended, and the umpire did not make his award till the 29th June, which the plaintiff contended was out of time, being more than three months from the time when the last arbitrator was appointed,

(a) 3 Rail. Ca. 367.

(b) 8 Vict. c. 18.

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and that, therefore, the award was void. On a motion for an injunction to restrain the company from taking possession of the land, Vice-Chancellor Wigram was of that opinion, and granted the injunction.

This was a motion on behalf of the company to discharge that order.

Mr. *Stuart* and Mr. *Bovill*, for the motion, contended that the umpire had three months for making his award from the time when the arbitration devolved upon him, which was, in this case, at the expiration of three weeks from the nomination of the last arbitrator; and therefore that the award was made in time.

Mr. *Teed* and Mr. *Steere*, *contra*.

THE LORD CHANCELLOR.—The 27th section of the act provides that where more than one arbitrator shall have been appointed, such arbitrators shall, before they enter upon the matters referred to them, appoint an umpire. That, then, is their first duty, before any question of disagreement between them has arisen. Then the 31st section provides that if the arbitrators shall fail to make their award within twenty-one days after the day on which the last of such arbitrators shall have been appointed, or within such extended time as shall have been fixed by them for that purpose, the matter shall be determined by the umpire; and that extended time is subject to the limitation of the 23d section, which provides that, if [477] "the arbitrators or their umpire shall for three months have failed to make their award, the question shall be settled by the verdict of a jury.

Now it is obvious that if the three months are, in all cases, to be reckoned from the day of nomination of the last arbitrator, it would be in the power of the arbitrators, by extending the time of making their award to the end of that period, to exclude the umpire altogether. That cannot have been the intention. The language of the act is, not "if no award shall be made within three months," but "if the arbitrators or their umpire shall have

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failed to make *their* or *his* award" within that time. That implies that the umpire shall have had an opportunity at least of making an award. I think, therefore, that as regards the umpire, the three months begin to run from the time when the arbitration devolves upon him, which, in this case, was at the expiration of three weeks from the 9th March: and, therefore, that the award being made on the 29th June, was in due time.

Order discharged.

CHUCK v. CREMER.

1846: Dec. 1, 9. 1848: Feb. 9.

Semble, Where an action is referred by an Order at *Nisi Prius*, this court has no jurisdiction to interfere with the certificate of the referee or the judgment entered up pursuant thereto, on any ground on which it would not have such jurisdiction if the judgment had been obtained in the ordinary course upon the verdict of a jury.

VARIOUS dealings had taken place between the plaintiff and one Charles Bell, deceased, between the year 1834, and the death of the latter in 1841, consisting, amongst other things, of purchases by the plaintiff from *Bell of malt, [*478] of which purchases, and the monies from time to time paid in respect of them, a separate account was kept. On the death of Bell, the defendant as his executor brought an action in the Court of Exchequer against the plaintiff for the general balance which he claimed to be due from him to the testator's estate.

Upon the cause coming on for trial, it was referred, by the usual *nisi prius* order, to a barrister to take the account, and judgment was to be entered for the sum which he should find to be due.

The referee having certified that £594 was due from the plaintiff to the defendant, judgment was signed for that amount; whereupon the present bill was filed, alleging, that in the proceedings before the referee, Cremer had produced a document

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purporting to be the malt account from December, 1837, to the 8th of February, 1841, and that the referee erroneously, and without sufficient evidence of its possessing the character of a stated and admitted account, had treated it as such, and had consequently not only declined to call for the books containing the accounts of prior transactions, but had refused the plaintiff credit for two sums of £500 and £250 which he had paid, as the bill alleged, on account of malt during the period embraced by the document, but which were not included in it; and therefore praying that the account contained in that document might be declared not to be a settled account, or at least that the plaintiff might surcharge it by the two sums above mentioned, and that the award might be set aside as incomplete and void, and that the account might be fully taken in this court, and that the defendant might be restrained by injunction from issuing execution on the judgment.

[*479] *The Vice-Chancellor of England having granted a special injunction(a) according to the prayer of the bill, A motion was made before the Lord Chancellor to dissolve it.

Mr. *Js. Parker* and Mr. *Daniel*, for the defendant, in support of the motion.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Kinglake*, *contra*.

After the nature of the case had been shortly stated, THE LORD CHANCELLOR said: What strikes me is this. Here is a legal demand, the subject of an action at law: instead of going to the jury to ascertain the amount due, an order is made at *nisi prius* referring that question to an arbitrator. That is only a mode of proceeding at law. This court has no more jurisdiction over a judgment so obtained, than if the amount had been ascertained by a jury; yet this application is made on the ground of a supposed failure of justice from something that has passed in the course of those proceedings. I should like, before the case pro-

(a) *Franklin v. Thomas*, 3 Mer. 225.

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ceeds further, to hear whether there is any authority for the interference of this court on such a ground as that.

The counsel for the plaintiff not being prepared with a case in point, the motion stood over to search for authorities.

On a subsequent day the motion came on again, when the counsel for the plaintiff referred to *Lord Lonsdale v.*

**Littledale (a)*, which they contended was on all fours [*480] with the present case.

THE LORD CHANCELLOR expressed some surprise at that case, but observed that it was different from the present one, inasmuch as the order was not the common order of reference, but something more; for the action being in trespass, for damage to the plaintiff's house, the order was not merely to assess the amount of damage, but to assess the value of the house, and that on payment of it, the plaintiff should convey the house to the defendant: it was not merely substituting the referee for the jury, but taking the matter entirely out of the court of law.]

They then referred to Lord Eldon's observations in *Nichols v. Chalie*, (b) and contended, that under an order to take an account generally, without any special directions as to settled or stated accounts, the referee had no authority to treat any part of the account as settled, and that having done so, he had in fact only awarded upon part of the matter referred to him: and that, as by such a decision the rights of the parties were not satisfactorily determined, and the matter was in itself one of equitable cognizance, being a matter of account, this court would take it into its own hands for the purpose of doing complete justice; observing that, after judgment had been signed, there was no remedy against the defective award at law.

At the close of this discussion, the Lord Chancellor said, his difficulty on the point of jurisdiction was not removed:

(a) 2 Ves. 451.

(b) 14 Ves. 265.

 1846.—*Chuck v. Cremer*.

[*481] but the case was eventually *argued on the merits, and judgment was reserved generally.

Feb. 9.—THE LORD CHANCELLOR now delivered judgment.— [After stating the circumstances of the case, and the substance of the affidavits in support of the motion, he proceeded.] The evidence then negatives any imputation of fraudulent conduct against the arbitrator, and only imputes to him error in treating the settled account as conclusive as to the matter it contains, so as to preclude the calling for the books relating to the antecedent period, and as to his not having given credit to the defendant at law for the two sums of 500*l.* and 250*l.* These are all matters clearly within the jurisdiction of the arbitrator. His duty was to ascertain the state of the account between the parties; and finding a document common to both, in which the quantities of malt and the prices and the sums paid on account of it were specified, it was his duty to consider how far such document should be received for the purpose of enabling him to ascertain the state of the account; and having decided that it was binding upon the parties, it followed that he should decline going into the particulars of the account so far as it was covered by this document, the nature and form of the account leading to the conclusion that there was not at the commencement of it any other account pending, relating to the same matter; and the books, the non-production of which is complained of, were only the books of the earlier transactions in the purchasing of malt. If this account was properly decided to be conclusive as to the malting account up to that time, it goes far to dispose of the question as to the 500*l.* and 250*l.* [His Lordship then commented upon the evidence relating to these two items, and proceeded.] I think, there-
 [*482] fore, that as the *evidence stands, the plaintiff has failed to show his title to credit for these two sums, and he has not attempted to impeach the award upon any alleged misconduct of the arbitrator; and if the title to these two sums were established, they would not be errors in the settled account, available for the purpose of opening it, but would merely be sums to which the plaintiff would be entitled independently of the items in the account.

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I have thought it right to examine the case upon the facts; as they appeared sufficient to enable me to dispose of it, rather than to rest my decision upon points of law, which in the state of the authorities could hardly be very satisfactory.

That a certificate or award under a reference at *nisi prius* is not under the statute,^(a) and therefore not within its restrictions, is now settled. "Under such a reference" as Lord Eldon observed in *Nichols v. Chalie*,^(b) "all the subsequent proceedings are nothing more than part of the transactions in the course of the suit at law in that court, which this court would upon its ancient jurisdiction control." This is, I think, clearly a right view of the case. The parties proceeding at law, it must be immaterial whether the judgment be founded on a verdict, or the certificate of an arbitrator, for the purpose of controlling such judgment in a court of equity upon grounds paramount the legal rights however enforced. But what is there to give to a court of equity any peculiar jurisdiction in case of a judgment founded upon such an award, which it would not have had, if it had been founded upon a verdict? Does a court of equity obtain any jurisdiction to interfere from the course of proceeding under such a reference, where "the nature of the question between the parties does not raise an equity?" That failure at law from the errors of the judge, or the jury, or in the conduct of the cause, will not *per se* give this court jurisdiction, is certain: does a different rule prevail where the failure is attributable to any conduct in the arbitrator? In all these cases the court of law has power to correct the error, if the party takes the proper steps to obtain such redress. Is there in the latter only a concurrent jurisdiction in equity? In *Nichols v. Chalie*, Lord Eldon seems to allude to some such principle. In this case the matter in dispute might have been the subject of a suit in equity, as well as an action at law, but as the whole was clearly within the jurisdiction of a court of law, that does not affect the case, *Harrison v. Nettleship*.^(c) The court of law has decided in favor of the plaintiff, and the defendant at law comes into equity for relief, alleging on his bill fraud in his opponent and miscon-

^(a) 9 & 10 W. 3, c. 15.^(b) 14 Ves. 268.^(c) 2 M. & K. 523.

 1848.—*Chuck v. Cremer.*

duct in the arbitrator; but wholly failing, or rather not attempting, in his affidavit to support either allegation.

Upon this ground I dissolve the injunction, giving no opinion as to whether the arbitrator was right or wrong in his decision, over which I have no control; or as to the other point to which I have alluded, but as to which I must be considered as not intending to express any opinion.

[*484]

*GLOVER v. HALL and another.

1848: Jan. 20.

Latimer v. Neate, 4 Cl. & Fin. 570, explained.

The mere statement in an answer of the substance of a document, the contents of which the defendant is not bound to disclose, does not make him liable to produce the document itself.

The principal question in the cause was, whether a party who was equitably entitled for life to a long term of years with a general power of appointment over the residue of the term had by a certain deed assigned the whole term to the party under whom the defendant claimed, or only her life interest. The plaintiff asserted that the deed had passed only the life interest. The defendant set forth a short abstract of the deed as showing the contrary. A motion for production of the deed was refused.

Production of a deed constituting the root of the plaintiff's alleged title, under particular circumstances refused.

THIS was the renewal of a motion which had been refused by the Vice-Chancellor of England, for production of certain deeds, admitted by the answer of the defendant Sir Benjamin Hall to be in his possession, and particularly of two of them dated respectively in March, 1804, and March, 1810.

The suit was instituted for the recovery of a messuage and certain premises called High Meadow, to which the plaintiff claimed to be equitably entitled for the residue of a term of ninety-nine years, created by the deed of March, 1804, and the legal estate in which was alleged to be in the defendant Jeffreys.

The case made by the bill was, that in the year 1804, Samuel Glover the plaintiff's father, being seised in fee of an estate called Abercarne, of which High Meadow then formed part,

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executed the deed of 1804, by which he demised High Meadow to Matthew Jeffreys and John Jeffreys for ninety-nine years at a pepper-corn rent; "in trust to suffer his wife Phyllis Glover, and such person and persons and their executors and administrators, as she should, in and by her last will and testament duly executed, give, devise, and bequeath the same, to take to his, her, and their own use and benefit, the rents, issues, and profits thereof, for and during the said term of ninety- [485] nine years, exclusively and notwithstanding her then present or any future husband, and not to be subject to the debts or contracts of any future husband she might afterwards marry, her receipt alone under her hand to be deemed and taken as a good discharge and discharges for the same."

That Samuel Glover died in 1809, having previously sold the Abercarne estate, subject as to High Meadow to the term of ninety-nine years, to the father of the defendant Sir Benjamin Hall; and that by the deed of March, 1810, Phyllis Glover had for valuable consideration assigned her life interest in that term to the same party; that she afterwards died in the year 1819, having by her will bequeathed the residue of the term to John and Matthew Jeffreys, and her two sons Joshua Glover and Peter Brown Glover, in trust for the said Peter Brown Glover and the plaintiff his sister, in equal moieties, with cross remainders between them in the event of either dying without children.

That, Phyllis Glover having omitted to appoint any executor of her will, her two sons took out administration to her estate with the will annexed, but that no proceedings were taken for the recovery of the premises comprised in the term, which were then in the possession of the plaintiff's father under the assignment of 1810, until Michaelmas term in the year 1839, when Peter Brown Glover who had survived his brother Joshua, brought an action of ejectment upon the joint demise of himself and the plaintiff, and also on another joint demise of Matthew and Joshua Jeffreys, against Sir Benjamin Hall, who had then succeeded his father in the possession of the estate, but in which action after delivery of the declaration no further proceedings were taken; and that Peter *Brown Glover [486]

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died in 1844 without children, whereupon the plaintiff became entitled to the whole interest in the premises for the residue of the term.

In reference to the deed of 1810, the bill after stating the plaintiff's version of it, and suggesting a pretence, that it was in fact an assignment of the whole residue of the term, and not merely of Phyllis Glover's life interest therein, and that John and Matthew Jeffreys were both parties to, and executed the same—charged the contrary to be true, and that though John and Matthew Jeffreys, were named as parties to the deed, they expressly refused to execute it, and never had done so; and that so it would appear if the defendant would set forth when, where, and in whose presence, and upon what occasion such assignment was executed by Matthew and John Jeffreys respectively, and by whom such execution was attested, and also the short and material contents of such deed of assignment, and particularly what interest in the premises was assigned or attempted to be assigned thereby. And after suggesting a further pretence, that the plaintiff's right, if any, was barred by the Statute of Limitations, the bill charged that it had been kept alive by the action which was brought within twenty years from the death of Phyllis Glover, but that at all events the plaintiff's right was not barred as to that moiety of the premises, the title to which accrued to her only on the death of her brother P. B. Glover, in 1844; and after further charging that the plaintiff could not prosecute the said action, or commence any other, as well by reason of the legal estate in the premises being outstanding in the defendant Jeffreys, as by reason of the deed of 1804 being in the hands of the defendant Sir Benjamin Hall, it prayed that Sir B. Hall might be decreed to deliver possession of the premises to the plaintiff, or that she might be at liberty to use the [*487] name *of the defendant Jeffreys in an action of ejectment, and that Sir Benjamin Hall might be ordered to produce the deed of 1804 at the trial.

There was no personal representative of Phyllis Glover, a party to the suit; nor did the bill allege that her debts had all been paid, or that her personal representative had ever assented to the appointment in favor of the plaintiff and her late brother.

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The defendant Sir Benjamin Hall by his answer admitted that the deed of 1804 was to the effect stated in the bill, but denied any knowledge of the will of Phyllis Glover, or whether the plaintiff was her daughter, or the person alleged to be so designated in the will. And he rested his title on the deed of 1810, which he insisted was an assignment by Phyllis Glover and the two trustees of the deed of 1804, all of whom he said had duly executed it, of all the then residue of the term of ninety-nine years, and not merely of Phyllis Glover's life interest therein; in confirmation of which he set forth a full abstract of the deed, purporting to be "an assignment and surrender of the premises in question, and of all the estate, right, title, interest, term, and terms of years, possibility, property, claim, and demand both at law and in equity, of Matthew Jeffreys, John Jeffreys, and Phyllis Glover, or any of them, in, to, or out of the same or any part thereof, unto Benjamin Hall, his executors, administrators, and assigns." After which there was a covenant by Phyllis Glover, for herself, her heirs, executors, and administrators, for further assurance by herself, her executors, administrators or assigns and all persons claiming or to claim under her, them or any of them, or under Samuel Glover.

The answer submitted that under these circumstances the defendant was not bound to produce either of the deeds, *stating, as to that of March 1804, that it was one of [*488] his title deeds, and that the plaintiff had no interest in it, or in the premises therein comprised; and as to the deed of March 1810, that it was his title deed, and that it did not evidence any title of the plaintiff; and there was, at the conclusion of the answer, a general statement as to all the deeds, production of which was sought, that they related to and evidenced the title of the defendant and his trustees to the property in question, and did not afford any evidence of any title in the plaintiff to the same or any part thereof. And the defendant insisted on the benefit of the statute of limitations as a bar to the whole of the plaintiff's demand, or at all events to the extent of that moiety of the premises to which, according to her own case, she became entitled in possession on the death of Phyllis Glover.

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Mr. *Turner* and Mr. *Collins* for the plaintiff.—The deed of 1804 being the root of the plaintiff's alleged title, she is, by the ordinary rule, entitled to the production of it. *Shaftesbury v. Arrowsmith*.^(a) She has also a right to see the deed of 1810: for the main question in the cause is whether that deed does or does not amount to more than the conveyance of Phyllis Glover's life interest. If the defendant had intended to protect it from production, he ought to have pledged his oath positively to its effect, instead of which he has set out an abstract of it. The plaintiff is, therefore entitled to see whether that abstract, correctly represents the purport of the deed or not, *Latimer v. Neate*.^(b)

[*489] *Mr. *Rolt* and Mr. *Goldsmith*, *contra*.—If the rule now contended for, on the authority of *Latimer v. Neate*, were correct, the question so much agitated in *Hardman v. Ellames*.^(c) as to the effect of an express reference to a document partially set out in an answer, would never have arisen. As to the deed of 1804, the plaintiff's interest in it depends on her being appointed under the alleged will of Mrs. Glover; but neither that will nor the identity of the plaintiff with the daughter who is said to be therein mentioned, is admitted by the answer; and for any thing that appears, the plaintiff may be a mere stranger to Mrs. Glover, and she is therefore not entitled to the production even of the deed of 1804, *Adams v. Fisher*.^(d) It is true that in that case the plaintiff's title was not merely ignored, but denied by the answer; but ignorance is equivalent to denial. *Smith v. Dowling*.^(e)

Mr. *Turner* in reply.

THE LORD CHANCELLOR.—The plaintiff's title, as set forth in the bill, to the property claimed, is under the will of Phyllis Glover, who died in November 1819, who, it is alleged, was entitled to a life interest in a term of ninety-nine years in such

(a) 4 Ves. 66.

(b) 4 Ch. & Fin. 570.

(c) 2 My. & K. 732.

(d) 3 Myl. & Cr. 526.

(e) 10 Jur. 63.

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property with a general power of appointment by will, under a deed of demise executed in the year 1804 by Samuel Glover, the owner of the fee. The defendant's title is, that those through whom he claims, purchased the fee from this Samuel Glover, subject to the term; and that they afterwards purchased and took *an assignment of the term from Phyllis Glover by a deed of 1810, which deed, however, the plaintiff alleges to have been only an assignment of her life-interest, and not of the whole interest in the term. [*490]

The plaintiff's title therefore being founded upon the deed of 1804, no subsequent transactions in which Samuel Glover may have engaged, can affect that title. But all the deeds the production of which is required, except the deed creating the term and the deed of 1810, are acts of owners of the estate subsequent to the creation of the term, and cannot, therefore, constitute any part of the plaintiff's alleged title, and, therefore, according to the established rule, are not liable to be produced upon the plaintiff's application.

But it was said that the plaintiff had obtained a right to the production of the deed of 1810 from the manner in which the defendant has referred to it in his answer; and the case of *Lutimer v. Neate*,^(a) and particularly what I am reported to have said in that case, was quoted in support of this proposition. And, certainly, if that case can be seriously quoted in support of that proposition, it is of importance that it should be better understood. It was a bill by a judgment creditor seeking payment of his debt out of property which the defendant had assigned to another, impeaching the assignments, but offering to pay what the assignee might have advanced upon the assignments. The pleadings showed that the assignments were only a mortgage security, so that the plaintiff established an interest in the documents: but the form of pleading was as follows:—The bill addressed interrogatories (for the purpose of proving that the assignments were securities *only) as [*491] to what the documents contained, which the defendant did not answer. Exceptions having been taken, the court held

(a) 4 Cl. & Fin. 570.

the defendant bound to answer, and allowed the exceptions; and, upon the further answer, the defendant set forth an abstract of the documents, professing, of course, to state truly what they contained; and the question arose upon the plaintiff's motion for production of the documents themselves, which the House of Lords held that the plaintiff was entitled to.

The observation I made in moving the judgment of the House on that case must be understood to have reference to the facts of the case; that is, to documents, the contents of which the defendant was bound to disclose. Nor is that left to inference; for I first observe that the plaintiff's right to redeem the property comprised in the assignments was established, and that the defendant's liability to give discovery of the contents of the documents in his possession had been established by the order of the court upon the exceptions, and, therefore, that the plaintiff was not bound to be content with the defendant's statement of such contents, but was entitled to see the documents themselves; and I conclude in these words: "I think your Lordships may safely affirm the order of the court below on these two grounds: First; that this is a case in which the plaintiff is not only seeking to redeem, but is seeking to have an instrument treated as a mortgage security, which the defendant has set up as an absolute title; and secondly, because the defendant, having set out what he states as the contents of the deed, the respondent, under these circumstances, is entitled to see whether the abstract be or be not a correct abstract of those deeds of which he asks the production."

[*492] "In that case there was an interest in the deeds established by the plaintiff, and a disclosure of their contents ordered by the court and professed to be given by the defendant. In the present case, the plaintiff shows no interest in the deed, and the liability to a disclosure of the contents is denied and resisted, and has not been ordered. This case wants every circumstance which existed in that case upon which the judgment was founded.

Upon these grounds I think the judgment of the Vice-Chancellor right in refusing to order the production of any of the deeds subsequent to the deed of 1804 creating the term. This deed,

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however, does form part of the plaintiff's alleged title ; it created the estate which she claims ; and, had the plaintiff connected herself with the estate of Phyllis Glover, I should have thought her entitled to a production of this deed ; but there is not, upon this record, any ground for assuming that she is entitled to any interest which Phyllis Glover may herself have had. Her title is under the will of Phyllis Glover, as legatee of a term of years. No representative of Phyllis Glover is before the court, although the alleged property was assets for her debts, no assent to the alleged legacy stated, and no recognition of an enjoyment of the alleged legacy, and no admission of the will under which she claims, and the bill not filed until twenty eight years after the alleged title accrued. It is not a case in which the defendant merely states that he is ignorant of facts or documents which constitute the alleged title of the plaintiff, but one in which the plaintiff has not alleged such a title as would entitle her, without more, to what she asks. This applies to all the documents, and is of itself sufficient to justify the order of the Vice-Chancellor. This motion must be refused with costs

 *PENNY v. TURNER.

[493]

1848 ; Jan. 29.

A gift to the testator's three sisters or their children as his mother should, by deed or will, appoint. Held to be a gift, in default of appointment, to the whole class of the daughters and the children equally ; not on the ground that "or" was to be construed "and," but that it was referable only to the power given to the mother, of selection from among the class, and as that power had not been exercised, and the court could not assume the exercise of it, the whole class must take equally.

THE WILL of Penny, by his will, dated the 5th of April 1792, after giving to his mother a life interest in all his property, gave and bequeathed as follows : "At the decease of my said mother, I will and devise that all the said estates and property shall be divided amongst my three sisters Jane Stevens, Elizabeth Turner and Harriet Penny or their children, in such proportions as my

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said mother shall appoint by her last will or by any deed in writing made by her in her life time."

The testator's mother and his sister Jane Stevens both died in his life time, and the latter without issue. On his death, in 1841, Harriet Penny was unmarried, and Elizabeth Turner had two children; and the question arose, in what manner the testator's estate was to be divided. Harriet Penny contended that it was to be distributed in thirds; one part to herself, another to Elizabeth, and the other third to be considered as having lapsed, and to be divided between herself and Elizabeth as co-heiresses at law, and sole next of kin of the testator. Elizabeth and her children, on the other hand, contended that it was divisible in fifths, the children to receive each one fifth, and the rest to be divided between Harriet and Elizabeth.

The Vice-Chancellor of England having decided in favor of the latter construction, Harriet appealed.

Mr. Walker and *Mr. Parsons* for the Appellant.

Sir F. Simpkinson and *Mr. H. Clarke* for Elizabeth Turner.

[*494] **Mr Faber* for the children.

THE LORD CHANCELLOR, after stating the will, proceeded as follows:—No appointment having been made by the mother, the question is whether the surviving sisters take the whole property, or whether their children are entitled to share it with them?

It was very properly admitted in the argument, that, under the early authorities, the children would be included; but it was argued that, by later decisions, they were excluded. I am of opinion that, upon an accurate consideration of the cases, no such inconsistency will appear.

On the part of the appellants, this case was sought to be brought within the principle of those decisions in which the word "or" has been construed as if it had been "and," in order to effectuate the intention of the testator; but it is not, in my opinion, subject to the nice distinctions and contradictory authorities which affect that rule of construction, but depends upon a prin-

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ciple quite independent of them. In *Burrough v. Philcox*,^(a) I endeavored to explain this by saying, "that when there appeared to be a general intention in favor of a class, and a particular intention in favor of individuals of the class to be selected by another person, and the particular intention fails from the selection not being made, the court will carry into effect the general intention in favor of the class." This was no new exposition of the rule, as the authorities referred to in that case prove; "but I do not see any reference made to Sir W. Grant's [*495] judgment in *Longmore v. Broom*,^(b) in which he says, "a bequest to A. or B. at the discretion of C. is good; for he may divide it between them."

I am not called upon to make any alteration or addition to the will, which the court never does without necessity. The executor might say to whom the fund should be given, the parents or the children; but the court has not that discretion; it has only to say what class is to take, and then the distribution must be equal.

Such was the doctrine of Lords Alvanly and Eldon in *Brown v. Higgs*,^(c) and of the House of Lords affirming that decree, and of Sir W. Grant in *Longmore v. Broom*, and that upon which I acted in *Burrough v. Philcox*. I find no fluctuation of opinion or departure from former rules. The doctrine is, I think, founded upon most correct principles, and supported by uniform decisions. The present case falls precisely within it. The mother had power to distribute the property as she thought best between the three sisters and their children. She certainly might have given some to each; they, therefore, constituted the favored class: Nothing was lost by the failure of the appointment, but the distribution or selection amongst this class: that having failed, the court cannot supply the execution of the power, but, to affect the general intent, gives the property to the whole class equally.

No difficulty would, I apprehend, have been found in the construction of this case, if it had been properly "dis- [*496] tinguished from other classes of cases in which the

(a) 5 Myl. & Cr. 92.

(b) 7 Ves. 124.

(c) 4 Ves. 708. 5 Ves. 495. 8 Ves. 561; and see 2 Sug. Pow. 176.

 1848.—Penny v. Turner.

court could only support its decision by giving to the word "or" the meaning of the word "and," as in cases of direct bequests to legatees or their children, as in *Richardson v. Spragg*,^(a) *Eccard v. Brooke*,^(b) or in cases in which there are various contingencies specified upon which a gift over is to depend; and the question is, the word "or" being used, whether such contingencies were intended to be conjunctive or disjunctive. Such cases are often of great difficulty, but from which the present is I think free. I am, for these reasons, of opinion that the judgment of the Vice-Chancellor is right, and that the appeal must be dismissed with costs.

[*497]

*FORDYCE v. BRIDGES.

1847: Nov. 8, 10; 1848: Feb. 12.

A testator bequeathed the residue of his personal estate to three persons, their executors, administrators, and assigns, in trust, that they or the survivor of them, or the executors, administrators or assigns of such survivor should invest it in the purchase of estates in England or Scotland, such estates, if in England, to be settled according to the limitations of the same will as to his own English estates, which were thereby limited to one for life, with remainder to his first and other sons in tail, and, if in Scotland, according to the limitations of a Scotch deed of strict entail, to which his own Scotch estates were then subject; and until such purchase could be found, should pay the income of the residuary fund to the person who would be entitled to the rents of the English estates so as to be purchased in case the same were actually purchased. And the will contained a power to such person, or, in case of his minority, to his guardian, to appoint new trustees, who were to have all the power and capacities of those in whose room they should be substituted. The three trustees invested the greater part of the residue in Scotch estates, and all died during the lifetime of the tenant for life. On his death, his son, who was entitled under the Scotch deed to the Scotch estates, as well as under the will to the English estates, conceiving himself entitled absolutely to what remained of the residuary fund, executed disentailing deeds, both of the money and of the English estates, and obtained payment of the fund to himself: but his right to do so being disputed on his death by the next Scotch heir of entail; Held that he had no such right, but that he was entitled only to the income of the fund during his life, and that upon his death, there being then no one by whom new trus-

(a) 1 P. W. 493.

(b) 2 Cox, 213.

1848.—Fordyce v. Bridges.

tees could be appointed under the power in the will, and the court being of opinion that the discretionary power of selecting between English and Scotch investment would not extend to trustees appointed by the court, the fund became devisible in equal moieties, one half belonging to the personal representatives of the deceased, and the other half to be invested in Scotch estates, to the uses of the Scotch deed. The rule which allows the first tenant in tail to represent the fee in suits affecting the estate does not apply to heirs of entail under a Scotch deed of tailzie; and therefore a decree made in a suit framed upon that principle, for the administration of a fund which in a certain event was liable to be invested in the purchase of land in Scotland to the uses of a Scotch deed of tailzie, was opened at the instance of a subsequent heir of entail under that deed.

How far and in what cases the heirs of a Scotch entail are necessary parties to a suit in this court touching matters in which they are interested as such heirs of entail, *quære*.

JOHN DINGWALL being possessed of real estates in Scotland, which he had entailed, by a deed in Scotch form, upon various branches of his family in succession, and having also a small real estate in England, and a very large personal estate, by his will dated the 13th of June 1808, devised the real estate in England to his grand-nephew John Dingwall, who was the institute under the Scotch deed of *tailzie, for life, with [*498] remainder to his first and other sons in tail male, with remainder to Arthur Dingwall Fordyce for life, with like remainder to his first and other sons in tail male, with divers remainders over. And he bequeathed his residuary personal estate to three persons, whom he named, their executors, administrators, and assigns, in trust, that they and the survivor of them, and the executors, administrators, and assigns of such survivor should lay out, and invest the same in the purchase of estates in England or Scotland, and should settle such of the said estates as should be in England to the uses of the English devised estates, and such of the said estates as should be in Scotland, to the uses of the Scotch entailed estates; and that, until a proper purchase or purchases should be found, they should invest the same in government or real securities, and pay the interest and dividends to the person or persons who would be entitled to the rents and profits of the English estate so as to be purchased, in case the same were actually purchased and settled. And the testator directed that in case any of the three trustees before-named, or any trustee to be appointed as thereafter mentioned,

1848.—Ferdyce v. Bridges.

or their, or any of their heirs, executors, administrators, or assigns should happen to die, or refuse, or become incapable to act in the trusts of the will, then and in that case, and as often as the same should happen, it should be lawful for the person or persons who for the time being should be entitled to the actual possession, or to the actual receipt of the rents of the devised estates if such person or persons should be of full age, and for their guardians respectively, during his, her, or their minority or respective minorities, by deed or writing to be sealed and delivered in the presence of, and attested by two or more credible witnesses, to appoint some other person or persons to be a trustee or trustees under the will, for all or any of the trusts there—
[*499] by *declared, in the place of the trustee so refusing, or becoming incapable to act; and every such new trustee was to have all the same powers, capacities, and privileges, as the trustee in whose room he should be substituted.

The testator died in 1812, and John Dingwall his great-nephew, thereupon entered into possession of both the English and Scotch estates, and died in 1831, leaving John Duff Dingwall his only son, an infant, who thereupon became entitled to the Scotch estates as next heir under the deed of tailzie, and to the English estates as first tenant in tail under the will. At that time all the trustees named in the will were dead, and no new ones had been appointed. Various portions of the residuary personal estate to the amount of £173,000, had been invested in the purchase of real estates in Scotland, and only £1529 in a similar purchase in England, leaving about £100,000 still uninvested.

In that state of things a bill was filed in the name of John Duff Dingwall, by a Mr. Gordon, his maternal grandfather as his next friend, against the executor of the last survivor of the trustees, and nine other persons whom the bill alleged to be the only persons known to the plaintiff who were interested under the Scotch entail, and all of whom were alleged to be out of the jurisdiction, stating to the effect above mentioned, and praying, amongst other things, the appointment of a guardian and an allowance of maintenance for the plaintiff, the appointment of new trustees, and that the funds constituting the uninvested

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residue of the testator's personal estate might be paid into court in the cause, and directions given for its investment in real estates, having regard to the disproportionate amount which had been invested in real estates in Scotland.

*None of the nine persons above mentioned appeared. [*500] to the bill except two, Arthur Dingwall Fordyce the person above named, who being resident in Scotland appeared gratis and put in a formal answer without oath or signature, and Patrick Dingwall. Arthur Dingwall Fordyce, who was then near ninety years of age, stood next in the Scotch entail after John Duff Dingwall and his issue; Patrick Dingwall came much lower down in the same entail, there being a considerable number of persons in *esse*, including sons and grandsons of Arthur Dingwall Fordyce, who preceded him in the line of succession, but were not parties to the suit.

Mr. Gordon having been appointed guardian to the plaintiff by an interlocutory order, the cause came on to be heard upon bill and answer before Sir John Leach, Master of the Rolls, on the 3d of August, 1833, when it was amongst other things, referred to the Master to approve of three proper persons to be new trustees of the will, and it was declared, that under the circumstances of the case, and having regard to the purchases of land which had been made by the former trustees, the residuary personal estate then remaining uninvested, ought to be invested in the purchase of real estates in England.

The uninvested fund having been transferred into court pursuant to that decree, and the Master having approved of three persons as trustees, the cause was heard for further directions on the 26th of April, 1834, when the Master's report was confirmed, and directions were given for vesting the trust estates in the new trustees. Arthur D. Fordyce had died a few days before that hearing; but no notice was taken of that event by revival of the suit or otherwise. On the 15th of October, 1836, John Duff Dingwall attained twenty-one, and the fund being *still uninvested and in court, he executed a disentail- [*501] ing deed, and having done so, applied by petition in the cause for a transfer of the fund to himself as being absolutely entitled thereto, as tenant in tail of the English estates; and ar

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order was made accordingly. John Duff Dingwall died in 1840 without issue, and was succeeded in the Scotch estates by a grandson of Arthur Dingwall Fordyce, an elder brother of the plaintiff in the present suit, on whose death without issue in 1843, the present plaintiff became entitled as heir of entail to the Scotch estates: and not having been named a party to the former suit, he instituted this suit insisting that Arthur Dingwall Fordyce did not represent him or the other substitute heirs of entail, and that according to the law of Scotland the rights of such substitute heirs could not be affected by proceedings in a cause to which they were not parties; that the proceedings in that suit were therefore not binding upon the plaintiff; that even supposing that the heirs of entail could be considered sufficiently represented by the nine defendants named on the record in that character, the decree was irregular inasmuch as there was no evidence that those who had not appeared were out of the jurisdiction: and, after charging that the investment of the fund in question in that former suit ought to have been left to the discretion of the new trustees when appointed, and that the declaration in the decree, that it ought to be invested in lands in England, was therefore erroneous, the bill prayed, that the representatives of John Duff Dingwall might be decreed to replace that fund, and to account for the interest thereon, from the 30th of December, 1843, when the plaintiff's title accrued, and a declaration that the principal fund ought to be invested in pursuance of the direction of the will of John Dingwall the testator, and that the trustees appointed in the former suit were not duly appointed.

[*502] *At the hearing of the cause before the Master of the Rolls, a decree was made according to the prayer, with the addition of a reference to the Master to approve of three new trustees, in the room of those appointed in the former suit.

This was an appeal by the defendant, the personal representative of John Duff Dingwall, from that decree.

Mr. Bethell, Mr. Rolt and Mr. Anderson, for the plaintiff, (the respondent.)

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Mr. Js. Parker, Mr. Russell, and Mr. Sidebottom, for the appellant.

Mr. Stuart and Mr. Purvis, for parties in the same interest with the plaintiff.

On the question of the regularity of Sir J. Leach's decree, as to parties, it was contended for the plaintiff, that the English rule of procedure, which allowed the first tenant in tail to represent the fee, was founded in the capacity of such tenant in tail to bar those in remainder and therefore could not apply to a Scotch heir of entail who had no such capacity. To which it was answered that the English rule was an arbitrary rule of convenience, and not founded on the principle referred to, inasmuch as it equally applied to an infant tenant in tail, who had during his minority no power to bar the entail: and that, unless the same rule were adopted in the case of Scotch entails where the rights of parties under them came in question in the English courts, it would be impossible to make any final adjudication upon such rights; for if the first heir of entail were incompetent to represent the whole series, all the heirs for the time being in *esse*, would for the same reason be "incom- [*503] petent to represent those who might afterwards be born.

On this point the following cases and authorities were referred to; *Gore v. Stackpole*,^(a) (*Redesd. Pl. 92 & 174, 4th ed.*), *Lloyd v. Johnes*,^(b) *Stansfield v. Habergham*,^(c) *Wright v. Atkyns*,^(d) *Stevenson v. Anderson*.^(e)

Assuming the decree of 1834 to be irregular, the next question was, what, in the events which had happened had become of the discretionary power given to the trustees, of selecting an English or Scotch investment: the plaintiff's counsel contending on the word "assigns" in the clause creating the power, that it would pass to trustees to be appointed by the court, observing that in the *Attorney-General v. Doyley*^(g) it appeared from the registrar's book that the power which, according to the report,

(a) 1 Dow. 18, 30.

(b) 9 Ves. 37

(c) 10 Ves. 273.

(d) T. & R. 143.

(e) 2 V. & B. 407.

(g) 2 Eq. Cas. Abr. 195.

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was given "to the trustees and the survivor and the heirs, &c. of such survivor," was in fact a power "to the trustees and the survivor, and the heirs, executors, and administrators"—*not* the assigns—"of such survivor;" and that in *Cole v. Wade*(a) also, which was founded in part upon *Attorney-General v. Doyley* the word "assigns" did not occur; they also referred to *Tilley v. Wolstenholme*.(b)

On the other hand it was argued, first, that if, as the plaintiff contended, the power was not barrable by the tenant in tail, it was void as tending to a perpetuity; in answer to which, however, *Wood v. White*(c) was referred to. Secondly, that the effect of the will as to the residuary personal estate was a bequest of the income to the owner for the time being of the English devised *estates, until some one capable of exercising the power should divest that interest by an investment of the fund in Scotch estates; and as trustees appointed by the court would have no such capacity, and the only person who could re-create it had refused to do so, it followed that, at the time when Sir John Leach's decree was pronounced, the interest of the English tenant in tail was absolute, and therefore, the decree right in substance upon the merits.

January.—THE LORD CHANCELLOR.—This is a case of, I believe, perfect novelty, and certainly one of great difficulty.

By a regular entail, according to the law of Scotland of 7th of September 1807, certain Scotch estates of John Dingwall, were entailed in favor of his grand nephew John Dingwall, and the heirs of his body, whom failing, to the heirs male of the body of the deceased William Dingwall of Culsh, whom failing, to the heirs male of the body of the deceased John Dingwall, of Rannieston, whom failing to the heirs of the body of Catherine Stewart, which entail was afterwards varied by excluding Arthur Dingwall, one of the heirs male of the body of William Dingwall deceased, and the heirs male of his body.

John Dingwall the author of this entail, by his will dated 13th of June 1808, devised estates in England to three trustees to the use of John Dingwall, the institute in the Scotch entail,

(a) 16 Ves. 27.

(b) 7 Beav. 425.

(c) 4 My. & Cr 460.

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for life, remainder to his first and other sons in tail male, remainder to the use of Arthur Dingwall Fordyce the plaintiff's grandfather for life, remainder to his first and other sons in tail male with other limitations over.

*The testator died in 1812, and John Dingwall, the [*505] institute under the entail and first tenant for life under the will, possessed both the Scotch and English estates up to his death in 1833, when his only son John Duff Dingwall succeeded to both, being tenant in tail of the English estates. He was under twenty-one; and, upon his death without issue male, Arthur Dingwall Fordyce, who had three grand-sons of whom the plaintiff in this suit was one, would have stood next in the entail.

The testator by his will gave the residue of his personal estate to his three trustees, their executors, administrators, and assigns upon trust, that they and the survivors and survivor of them, and the executors, administrators, and assigns of such survivor should convert the same into money, and lay out the residue in the purchase of estates in England or Scotland, and settle such of the estates as should be in England to the same uses as the lands devised, and such of the said estates as should be in Scotland in the same manner as the lands in the Scotch entail were settled: and that until proper purchases should be found, the money should be invested in the public funds, and the income paid to the person who should be entitled to the rents and profits of the English estates when purchased.

It appears that a very large sum, part of this residue, was invested by the trustees in the purchase of lands in Scotland. In the year 1833, when John Duff Dingwall's title accrued, all the trustees were dead; and Alexander Dingwall, the executor of the survivor of them, declined to act in the trusts; and there being beyond what had been so invested in the purchase of lands in Scotland, a large residue of the personal estate uninvested, a bill was filed in the name of the infant, John Duff Dingwall, for securing the personal estate, *for inquiries as to [*506] propriety of the purchases of the estates in Scotland, and for the investment of the residue in the purchase of estates

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in England, and for the appointment of new trustees, and of a guardian for the plaintiff.

The bill of 1833 made several persons parties, who were interested in the Scotch entail, but not including the present plaintiff, and alleged that they were out of the jurisdiction; and the bill in the present suit alleges that Arthur Dingwall Fordyce, the plaintiff's grand-father, and Patrick Dingwall alone, of the parties interested in the Scotch entail, appeared to that suit, and that Arthur Dingwall Fordyce appeared gratis, and that his answer was put in without oath or signature; but I do not find any proof that the parties alleged to be out of the jurisdiction were, in fact, amenable to the process of this court. The contrary, indeed, must be assumed to be proved, the decree of August 1835 reciting that all these defendants were out of the jurisdiction.

These are the circumstances which raise the first question upon this appeal, viz. how far this suit was binding upon the plaintiff, who had certainly a very important interest in the matter of this suit, but who was not a party to it, and, who, claiming under the entail, does not derive title through any one who was a party to the suit; but Arthur Dingwall Fordyce, the plaintiff's grandfather, and the first heir of entail after the plaintiff in the suit of 1833, and Patrick Dingwall, were parties to it. Two questions arise—first, how far and in what cases the heirs of a Scotch entail are necessary parties to a suit in this court touching matters in which they are interested as such heirs of entail; and, secondly, how far the suit can be available [*507] in their absence upon *proof of their being out of the jurisdiction. As to the first, no suit could proceed if they were all, in all cases, necessary parties, not only on account of their number, but because future heirs of entail, coming into *esse*, their claim not being through any persons parties to the suit, would not be bound by any proceedings in it. And this makes it useless to consider the second question, because, as you cannot have in any shape before the court all the heirs of entail whom you seek to bind, it would be idle to prove that some are out of the jurisdiction. When it shall become necessary to decide this point, some rule must be laid down for which there is

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no precedent, but which is necessary, to avoid a failure of justice in this court, from the peculiar nature of the interests under a Scotch entail. I do not find any allegation or proof that any fraud was intended or practised in the arrangement of the parties for the purpose of keeping from the view of the court the real question between the parties interested in the Scotch entail and the English settled estates: but the decree under consideration declares that the plaintiff is not bound by the proceedings in the suit of 1833; and I do not think it possible to dispute that proposition, because if the plaintiff be right in any part of the claim he makes, he had, at the time of the decree of 1833, a direct interest in the subject of that suit in his own right, though not in possession. I therefore proceed to consider the decree appealed from, upon its merits; for, though the plaintiff be not bound by the proceedings in the former suit, he cannot have a decree in this suit, unless he can show that he was injured by the former decree, or has interests inconsistent with its directions.

Upon the merits, the complaint against the decree of 1833 is, that the plaintiff in that suit, John Duff Dingwall being, in point of enjoyment, only tenant for life *of the Scotch [*508] estates, and tenant in tail of the English estates, procured that decree without due regard to the interests of the parties interested in the Scotch estates, for the purpose of obtaining an absolute interest in the uninvested residue of the testator's personality, and which was carried into effect by the order upon his petition, after he had attained twenty-one, by payment to him of such residue a tenant in tail of the fund.

By the will, a discretion was given to the three trustees, their executors, administrators, and assigns, to lay out the fund in land in Scotland, to be settled as the entailed Scotch estates, or of lands in England, to be settled as the English estates under the will; but until proper purchases could be found, the income of the fund was to be paid to the person entitled to the rents of the English estates. In 1833 the three trustees were dead. Alexander Crombie was the executor of the survivor, but he declined to act, and by the decree of 3rd of August 1833, he was, at his own request, discharged from the trusts of the will, and a reference was made to the Master to appoint new trustees.

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The important question is, whether at this time the discretionary power of choosing estates in England and Scotland, for investing the residue of the personal estate, remained. It certainly had determined, unless a new trustee could have been appointed within the terms of the power for that purpose in the will. That power, in the event, which had happened, of the death of the trustees, and the refusal to act by the executor of the survivor, was given to the person entitled to the rents of the devised estates, and in case of the minority of such person it was given to the guardians of such person, and it was declared that the person so appointed should have the same powers [509] and capacities as the trustee in "whose room he should be substituted. At the time the bill of 1833 was filed, the plaintiff, John Duff Dingwall, had no guardian; but pending the suit, and before the decree William Gordon, his grandfather and next friend, was appointed his guardian by the court in the usual manner, and as such and as next friend he was a party to the decree by which it was referred to the Master to appoint new trustees. If, therefore, William Gordon could be considered as a guardian within the meaning of that term as used in the clause of the will which created the power, and could therefore have appointed new trustees under it, the decree shows that he declined to exercise that power; and it cannot be supposed that he would have exercised any such power, because at that time the affairs were in a state most favorable to the infant, who was entitled to the income of the fund until a proper purchase could be found, and whose permanent interest in these funds could only be defeated by the exercise of the discretionary power by purchasing lands in Scotland, which power, if not already absolutely gone, could only be revived by the appointment of new trustees by himself. The result however was, that at that time there was not any person capable of exercising that discretion, and the necessity of appointing trustees for the protection of the property was pressing. The court, therefore, as a matter of course, took upon itself the duty of appointing trustees; and this brings the case to the important question—what effect had this state of circumstances upon the title and interests of the parties respectively in the Scotch and English estates?

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The Master of the Rolls, from the note of his judgment, appears to have thought "that in 1833 new trustees might have been appointed with the sanction of the court, who would have had the same discretionary power as *those appoint- [*510] ed by the will—that the court ought not itself to have exercised the power, but only to have taken care that persons to whom the testator intended to give such discretion were duly appointed." My great difficulty is to understand in what manner and by what means the court could have appointed, or procured the appointment of, trustees, who would have been authorized to exercise the discretionary power given by the will to the original trustees. If William Gordon had the power to appoint such trustees, the court had no means of compelling him to exercise it, and by so doing to prejudice the interest of his ward. Any trustees appointed must have been appointed by the court, and that such trustees could not exercise the discretionary power is, I conceive, well settled; *Attorney-General v. Doyley*,^(a) *Cole v. Wade*,^(b) *Walker v. Walker*,^(c) and *Penny v. Turner* lately decided by myself, and the cases there referred to. I observe that the Master of the Rolls seems to have intended to adopt the same plan in his decree in this cause; for, by the note of his judgment, he says that he proposed to declare that the trustees appointed in 1833 were not duly appointed, and to refer it to the Master to approve of trustees to be appointed by the plaintiff as the person then entitled to the actual possession or to the actual receipt of the rents of the estates devised by the will; but the decree as drawn up, after reciting that there was not any person entitled to nominate and appoint trustees of the testator's will under the power therein contained, by reason of the real estates thereby devised having been disentailed and conveyed, referred it to the Master in the usual manner to appoint three new trustees in the place of the three named in the will; and yet it declares that the residue of the personal estate ought to be laid out in the purchase of *land in England or Scot- [*511] land, according to the directions of the testator's will, by the trustees so to be appointed, which would give to the trus-

(a) 4 Vin. Abr. 485.

(b) 16 Ves. 44. 47.

(c) 5 Madd. 424.

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tees so to be appointed by the court, the same discretionary power which was given to the trustees by the will, contrary, as I conceive, to the authorities above referred to—a result and inconsistency not arising from any thing the Master of the Rolls said or intended, as his decision was founded upon the supposition that the power to appoint new trustees under the will was still subsisting, but from an alteration in the decree, when it was found that this power was gone, appointing new trustees by the court, but leaving standing the declaration as to the exercise of the discretionary power, which, though consistent with the appointment of trustees, as intended by the Master of the Rolls, is totally inconsistent with the appointment of trustees by the court as directed by the decree. It is therefore impossible that this decree should stand, but it remains to be considered what, under all these circumstances, are the rights of the parties, and what were those rights in 1833.

It is, in effect, admitted by this decree that the discretionary power is gone; and it was, I think, equally incapable of being exercised in 1833. At that period, the court found that the trustees had previously exercised it to the amount of 173,443*l.* by investing that sum in the purchase of lands in Scotland, and 1529*l.* only in the purchase of lands in England, and that the uninvested residue amounted to 103,749*l.* stock and money; and having regard to the investment in Scotland, declared that the uninvested residue ought to be laid out in the purchase of lands in England. Assuming that this decree was not binding upon the plaintiff in the present suit, what independently of that decree, were his rights to this uninvested residue? The [*512] bill "prays for repayment of the whole of this uninvested residue, and an account of the dividends and interest from December, 1843, when the plaintiff's title to the entailed estate in Scotland accrued; and the decree directs repayment of the whole, and declares that no part of it ought to have been paid or transferred to John Duff Dingwall, and that the plaintiff in this suit is entitled to such dividends and interest which have accrued since December, 1843, and yet it declares that the capital ought to be invested in the purchase of lands in Scotland or England. John Duff Dingwall was tenant in tail of the

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English settled estates: he was therefore, absolutely entitled to so much of this uninvested residue as ought to have been invested in the purchase of lands in England, and by the deed of 15th November, 1836, he assigned all such fund, and afterwards obtained the order for payment. The extent of this decree may be attributed to the impression upon the mind of the Master of the Rolls, "that the plaintiff in this suit was entitled to the actual possession, and to the actual receipt of the rents of the estates devised by the will." The decree to this extent, cannot stand, with the alteration introduced into the decree as drawn up; but the question remains, whether the plaintiff has any title to have any part of this uninvested residue applied to the purchase of lands in Scotland.

Assuming as I do, that the discretionary power had ceased to exist before the decree of 1833, what interest had the plaintiff, or any other heir of entail of the Scotch estates in this uninvested residue? Where there is a discretionary power of distribution, which cannot be exercised, this court does not assume the exercise of the discretion, but distributes the fund equally amongst all the objects of the power. I have so recently had occasion to refer to this rule, and particularly in *Penny v. Turner*,^(a) that I only refer to the result of the cases [*513] there quoted. It is true, that in all those cases the discretion was in selecting the objects to take, and in this case the discretion is in selecting the nature and character of the estates to be purchased; but the effect and result is the same in both, different persons being interested in the different estates. The selecting of one estate in preference to another is, in its effect, the selecting of that class who are interested in the estate selected, in preference to the class interested in the estate rejected: in both the discretion was intended to be exercised by the trustees appointed; in neither, upon the failure of the exercise of that power, will the court assume the discretion, but in both it will divide the fund, equally amongst the parties, the objects of the powers. The decree of 1833, does not follow this rule, but gives the whole fund to the parties interested in the English

(a) *Ante*, p. 493.

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estates, because a larger part of the residue had before been invested by the trustees for the benefit of the parties interested in the Scotch entailed estates. I regret that I cannot find any principle to support this application of the fund, as it would be an approximation to equality between the parties; but the equality adopted by the court is confined to the unappointed fund. It is acting upon the general intent, as to such fund, to benefit the different classes, the particular object of a selection from amongst them being defeated by the non-execution of the power. This is precisely what occurred in *Maddison v. Andrew*,^(b) when, there having been a valid but unequal appointment of part of the fund, and an invalid appointment of another part, Lord Hardwicke held that the unappointed fund, should be equally divided amongst the objects of the appointment,

without regard to the share they had received from the
[514] valid appointment. *Many cases establishing the same rule, are referred to in Sir Edward Sugden, on Powers, vol. 2, p. 238. To regulate the distribution of an unappointed fund by what had previously taken place, would be an assumption by the court of the exercise of the discretionary power which it disclaims. It appears to me, therefore, that well established principles compel me to hold that the discretionary power had ceased to exist in 1833; that the court had no right to exercise it, and that the objects of the power being those interested in the Scotch entail, and those interested in the English devised estates, upon failure of the power to select amongst them, the unappointed fund was equally divisible between these two classes, half that fund being subject to be invested in land in Scotland, for the purpose of the Scotch entail, and half being payable to those who have become entitled to the English devised estates.

The will directs that the whole income of the fund should be paid to the party entitled to the rent of the English estates, until proper purchases should be found. The Master of the Rolls' decree declares that the plaintiff is entitled to the whole of such income from 1843. As to half of the income I think that he

(a) 1 Vez. 57.

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has no title, and, if the words of the will were to be acted upon, he could have no title to the other half, but I think that the plaintiff has a right to say that, upon the separation of the two estates by the death of John Duff Dingwall in 1840, the discretionary power not then existing, the interim direction for payment of the interest to the person entitled to the rents of the English estates ceased, and that the division of the fund ought then to have taken place, and that the plaintiff is therefore entitled to half of such interest from the time his title accrued in possession on 30th December, 1843.

*An objection was made that the bequest of a fund to [*515] be invested in a regular Scotch entail was void as a perpetuity. The rules acted upon by the courts in this country with respect to testamentary dispositions tending to perpetuities relate to this country only. What the law of Scotland may be upon such a subject, the courts of this country have no judicial knowledge, nor will they, I apprehend, inquire: the fund being to be administered in a foreign country is payable here though the purpose to which it is to be applied would have been illegal if the administration of the fund had been to take place in this country. This is exemplified by the well established rule in cases of bequests within the statute of Mortmain. A charity legacy void in this country under the statute of Mortmain is good and payable here if for a charity in Scotland. It is true that Scotland is in terms excluded from the operation of the statutes, but that exclusion would be useless and inoperative, if the legacy would have been void, though to be administered in Scotland, merely because it would have been void if administered in England; and it would still be so, not by the effect of the statutes but by the rule of law; but such is not the law, and I think that the objection raised, upon the ground of perpetuity, cannot be maintained. I have made such alterations in the decree of the Rolls as appear necessary to carry the above decision into effect, but if any difficulty occurs to the parties, I shall be glad to have the minutes discussed at the earliest opportunity.

On a subsequent day it was stated that all parties were sat-

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isfied with his Lordship's decision, and the decree was drawn up accordingly.

[*516]

**MASON v. WAKEMAN.*

1847: May 5. 1848: Jan.

A defendant cannot, under the 38th General Order of August 1841, decline to answer any interrogatory, merely on the ground that the bill is open to a general demurrer.

THE defendant, by his answer, declined to answer a considerable portion of the bill, and, upon exceptions, attempted to sustain the sufficiency of the answer, on the ground that the bill was open to a general demurrer; but the Master allowed the exceptions, at the same time expressing an opinion that the 38th General Order of August 1841, did not authorize him to inquire whether the bill was demurrable or not. The Vice-Chancellor, however, upon exceptions to the report, was of a different opinion upon the construction of the Order, and considering the bill to be in fact demurrable, he held the answer to be, on that ground, sufficient.

This was an appeal from that decision.

Mr. *Anderson*, for the appellant.

Mr. *Rolt*, for the respondent.

Drake v. Drake,^(a) *Fairthorne v. Weston*,^(b) *Kaye v. Wall*,^(c) *Molesworth v. Howard*,^(d) and *Baddeley v. Curwen*,^(e) were cited, from which it appeared that Vice-Chancellor Wigram agreed in the construction of the Order with the Vice-Chancellor of England, and that Vice-Chancellor Knight Bruce differed from both.

(a) 2 Hare, 647.

(b) 3 Hare, 387, 393.

(c) 4 Hare, 137, 263.

(d) 2 Coll. 145.

(e) *Ibid.* 151.

 1848.—*Mason v. Wakeman.*

*THE LORD CHANCELLOR.—This question turns up- [*517] on the construction of the 38th order of 1841, as to which Vice-Chancellor Knight Bruce and Vice-Chancellor Wigram have differed. With such a balance of decisions, it comes before me with an equal weight of authority on both sides.

The point is, whether, under this order, a defendant who answers a demurrable bill can protect himself from answering any interrogatories in that bill, upon the ground that he might have demurred to the whole bill. Before I consider the language of the order, it is proper to call to mind what was the difficulty which, according to the former practice of the court, had been felt by defendants desirous of protecting themselves against answering particular parts of bills: for if that be clear, it may help towards the construction of an order intended, it may be assumed, to remove such difficulty.

There never was, as far as I am aware, any doubt or difficulty in the practice as to a defendant being bound to answer every question unobjectionable in itself, although the whole bill might have been demurred to; but there was no point of more doubt and difficulty than how and in what cases a defendant might, by answer, insist upon an objection to answering any particular question. In some few cases it was permitted, in others it was denied, and in others it was the subject of the greatest doubt and controversy: to prove which, it is only necessary to refer to *Dolder v. Lord Huntingfield*,^(a) *Faulder v. Stuart*,^(b) and *Shaw v. Ching*.^(c)

*Fortunately, I am not called upon to decide any such [*518] question; and I fully concur in what Lord Eldon says in *Faulder v. Stuart*, "that it would be a painful and difficult duty to be called upon to say which of the various and discordant opinions of Lords Thurlow, Kenyon and Rosslyn, and of Lord Chief Justice Eyre, was right." Beyond all doubt, the point was one of great difficulty and doubt, and one which, affecting the general practice of the court, it was important to set at rest. It was *dignus vindice nodus*.

Another matter of some importance is to see in what company

(a) 11 Ves. 282.

(b) Ibid. 296.

(c) Ibid. 303.

 1848.—*Mason v. Wakeman.*

this order is to be found. The 33rd and 34th apply to pleas and demurrers to the whole bill, the 35th to pleas to the whole or part of the bill, and the 36th, 37th, and 38th to pleas and demurrers to parts of the bill: but the terms of the order itself must decide the question, although these considerations may be called in aid if the construction be doubtful.

The commencement of the order is clearly confined to objections to answer part of the bill. "A defendant shall be at liberty, by answer, to decline answering any interrogatory, or part of an interrogatory." The matter is, how a defendant is to deal with part of the bill—an interrogatory, or part of an interrogatory—which before he could not, except in certain cases, refuse to answer, having answered other parts of the bill: in many of such cases he might have demurred to the question; but this order says he shall have the same power of protecting himself by answer that he might have had by demurrer. Protecting himself against what? against answering a particular interrogatory. Must not, then, the word demurrer be intended a demurrer to the particular interrogatory—the thing, for remedy of [519] which the order was required? It is true the word demurrer may of itself mean a demurrer to the whole bill, as well as a demurrer to part of the bill; but it is generally found coupled with some expression explanatory of its meaning. If you are speaking of a bill, and say that the defendant put in a demurrer, you are understood to mean a demurrer to the whole; so if you are speaking of part of a bill—a particular interrogatory—and say the defendant put in a demurrer, you are understood to mean a demurrer to the particular question. If any one should say that a defendant had protected himself from answering a particular interrogatory by demurrer, would he be understood to mean that the defendant had put in a general demurrer to the whole bill? Yet such would be the effect of a general demurrer.

The latter part of the order is not only consistent with these observations, but confirmatory of them, and appears to me conclusive of their soundness; for it says "the defendant shall be at liberty so to decline, notwithstanding he shall answer other parts of the bill from which he might have protected himself by

1848.—Mason v. Wakeman.

demurrer." The case assumed is an answer to certain parts of the bill, and a declining to answer other parts. Can the word demurrer here used mean a general demurrer to relief? Such a demurrer might indeed have protected the defendant from answering any part he had answered, not by affording a particular defence against a particular question, but by preventing any answer at all, whereas the orders contemplate, and in terms refer to, an answer being put in.

The word demurrer, therefore, means not a general demurrer, but a demurrer to answering some particular part of the bill; and in that sense it is used throughout the order.

"I have already observed, that if the order could be [*520] supposed to mean a general demurrer, it would be applying a remedy when there was no complaint; but the consequence of such a construction demonstrates, to my mind, that there could not have been any such intention. All the rules respecting general demurrers, restraining the time within which they must be filed, would be at once abrogated, because, up to the last moment allowed for answering, the defendant might delay raising the identical question which a general demurrer would have raised, with this extraordinary difference—that, if raised by a general demurrer, the court would at once have disposed of it; whereas, by so delaying it, the Master, and not the court, would have the jurisdiction. It could not have been intended to transfer this important jurisdiction to the Master: and if it had, such intention would have been distinctly expressed.

Differing as I do from the opinion of Vice-Chancellor Wigram upon this question, and concurring with that of Vice-Chancellor Knight Bruce, I abstain from commenting upon the cases in which those opinions have been expressed, except that, as to what Vice-Chancellor Wigram attributes to me in *Kaye v. Wall*,^(a) I have no recollection whatever, beyond this, that I carefully considered the orders before they were made; and although I cannot recall any thing which may have passed respecting this 38th order, if I may judge of what I should have thought of it then from what I think of it now, I should never

(a) 4 Hare, 287.

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have sanctioned it, had I supposed it capable of the construction now put upon it.

The exceptions to the Master's report must be overruled.

[*521] *IN THE MATTER OF UNIVERSITY COLLEGE, OXFORD.*

EX PARTE MOORSOM.

1848: Jan. 16; Feb. 16.

A provision in the statutes of a college that, among candidates for a particular fellowship, those should be preferred who should be born nearest to a particular place, Held to be operative only in case of equality of merit.

Where by college statutes one of the qualifications of a fellow, was, that he should be "in sacerdotio constitutus" before his admission, and the general practice of the college was to admit fellows elect on the expiration of a six months' probation from the time of their election, but the statutes prescribed no particular limit to the period of probation; an objection to an election, that the word "sacerdotium" meant the order of priesthood, and that the party elected was not, at the time of his election, old enough to be capable of taking even deacon's orders within six months, was overruled, it being held, 1st, That "sacerdotium" meant holy orders generally, and, 2dly, That the fellow elect might, either by a faculty from the Archbishop, or by an extension of the period of probation, which the college were willing to grant, procure deacon's orders within the necessary period.

THIS was an appeal to her Majesty as Visitor of the College, which was referred, according to the usual course, to the Lord Chancellor.

The material facts of the case, and the several questions involved in it, appear so fully from the judgment, as to dispense with any preliminary statement of them.

Mr. Cooper and *Mr. Adams* for the petitioner.

Mr. Bethell, *Mr. Twiss*, and *Mr. R. Palmer* for the Master and Fellows of the College.

THE LORD CHANCELLOR.—The petitioner complains of the election to two fellowships in May last, the petitioner claiming a

1848.—In re University College, Oxford.

preference over both the parties elected, and therefore a right to have been elected in their place.

"The first is, the election of Mr. Bright to a fellow-ship upon the foundation of King Henry IV., and the other the election of Mr. Conington to a fellowship upon the foundation of William of Durham. [*522]

As to the last the case is, that the petitioner was born in Yorkshire, at a place nearer to Durham than the birthplace of Mr. Conington, which was in Lincolnshire; and that the petitioner was at the time of the election a Master of Arts, and Mr. Conington only a Bachelor of Arts.

The provision of the statute for the election to the fellowship of William of Durham are these:—"Quilibet eligendus in locum Magistri Wilhelmi de Dunelmia sit ornatus moribus, facultatibus pauper, et ad proficiendum in facultate Theologica magis aptus; cæteris vero paribus ille præteratur cæteris qui de partibus Dunelmie proximis oriundus extiterit; sit magister in artibus, si talis commodè reperiri poterit, istius patriæ; si non, sit baccalaureus, vel si necesse fuerit sophista."

The petitioner not alleging that he was superior or even equal to the gentleman elected, rests his case altogether upon his having been born in a place nearer to Durham than the place of Mr. Conington's birth, and having been a Master instead of a Bachelor of Arts. Unless these circumstances give him a right to be elected, notwithstanding want of equality with his opponent in all other qualifications, he does not even state a ground of complaint, for I am very clearly of opinion that unless such equality existed, the place of his birth gave him no title whatever.

The statutes leave no doubt upon this subject, and I find Lord Hardwicke, Lord Rosslyn, and Lord Eldon acting upon this construction of these or similar words. In 1740, the petitioner Hobson claimed equality with his opponent, and a preference from having been born nearer to Durham; and Lord Hardwicke's order, finding that he was equal in learning to his opponent, and that he had been born nearer to Durham, declared that he ought to have been elected; whereas, if the preference by birth had alone given a title to the fellowship, the ex- [*523]

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amination and the declaration as to equality would have been useless. In *Ex parte Wrangham*(a) Lord Rosslyn refused to disturb the party elected, although the party complaining had been the only candidate possessed of the title to preference. In *Robson's Case* in 1802, the party elected was an undergraduate and born at a place further removed from Durham than the birth-place of the petitioner, who was also at the time of the election a Master of Arts, but Lord Eldon confirmed the election. I do not find that the petition in that case, any more than in the present, alleged superiority or equality with the other candidates. The course adopted by Lord Brougham in the *Catherine Hall Case*,(b) is by no means inconsistent with this construction of the statute. In that case the qualification was positive, and not qualified by the *ceteris paribus* proviso. It was a close fellowship, and the decision was only that competency, to be ascertained by examination, was in such cases a qualification to be implied. I am of opinion that there are no grounds whatever for impeaching Mr. Conington's election.

The grounds upon which Mr. Bright's election is impeached are different, but their insufficiency scarcely open to more [*524] doubt. This fellowship was one of 'Henry IV.'s foundation, and the objection made is, that the party elected ought to be in priest's orders at the expiration of the six months of probation, whereas Mr. Bright could not, in the usual course, have obtained even deacon's orders within that time. The answer was, that deacon's orders would answer the requisition of the statute, and that his confirmation as fellow was not required to be at the expiration of the six months, and that he might have obtained deacon's orders within the six months but for the interference of the petitioner.

The words of the statute are,—*Eligendus in locum Henrici Quarti sit in sacerdotio constitutus* (saltem prius quam in perpetuum socium admittatur.) Much research has been used, many authorities referred to, and much ingenious argument used for the purpose of ascertaining the proper meaning of the words, "*In sacerdotio constitutus*." I am clearly of opinion, that, al-

(a) 2 Ves. 609.

(b) 2 R. & M. 590.

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though the word *sacerdos*, as describing an order of the priesthood, may mean a priest, the word here used means the order of priesthood, or the ministry of which deacons forms one class; it means what is understood by the common expression of being in holy orders; and, therefore, whatever the statute may require upon that subject will be satisfied by the possession of deacon's orders. The case of Ingledew's fellowship in Magdalen College, before North, Bishop of Winchester, relied upon by the petitioner, appears to me to support strongly this interpretation of the term, not indeed as it appears upon the affidavit of Mr. Moorsom, but from the more ample information of the circumstances of that case contained in the affidavit of the Master.^(a) The statute contained "the expression "In [*525] *ordine sacerdotali constituti*;" and it was provided, *Quod nullus in dictum numerum scoliarium prædictorum eligatur nisi qui primam tonsuram clericalem habens, nullum impedimentum canonicum præter defectum ætatis patiens, ad sacerdotium sit aptus*. And then certain duties were imposed upon some two of the fellows, which could only be performed by persons in priest's orders.

Upon these statutes the bishop, as visitor, in 1799, held^(b) that the college might elect as probationer for a fellowship, first, a person not actually in holy orders; secondly, a person in deacon's orders whose age would not admit of his being a priest before the expiration of his year of probation; and, thirdly, a layman, if his age be such as to admit of his being a priest before the year of probation expires. This last is not very intelligible if the term "priest" is understood as meaning a person in priest's orders, in opposition to deacon's orders, because it does not appear how the party elected, being at that time a layman, could become a priest within twelve months, or why, if a deacon, according to the second answer, need not become a priest within

(a) *i. e.* of the College.

(b) These points were resolved by the bishop upon a case which the College submitted to him extrajudicially as visitor, in the year 1799. Four years afterwards, the question came before him judicially upon the appeal of Mr. Ellerton, a rejected candidate for a scholarship, on Dr. Ingledew's foundation.

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the twelve months, it would not be sufficient for a layman to become a deacon within that time. It is probable that in this third answer there was no intention of drawing any distinction between priest's orders and deacon's orders, but that the word priest was used in opposition to that of layman; and this appears the more probable from the frame of the three questions of which the very words are adopted in the answer.

[*526] "This being the general exposition of the statute, the decision in 1803 was between a candidate in orders and a layman of an early age who could not, as the expression is, "before or at the time of his becoming actual fellow become a priest and thereby satisfy the words of Mr. Ingledew." No distinction arose in this case between priest's orders and deacon's orders: and the only way of reconciling this with the opinion of 1799, is to consider the word "priest" as "in the priesthood" and used in opposition to the word "layman," and not as intended to mark any distinction between priest's orders and deacon's orders. If this be the right interpretation of the third answer in 1799, and of the term used in the decision of 1803, the second answer of 1799 is a distinct declaration that, under these provisions of the statutes, it is sufficient if the party elected be in deacon's orders at the expiration of the period of probation, or rather before he was confirmed as a Fellow.

The petitioner, however, contends that, although this should be so, yet that deacon's orders must, in the present case, have been obtained within six months after the election, which took place on the 1st of May; and that, as Mr. Bright would not attain the age of twenty-three until the 14th of December, it was at the time of the election impossible for him to obtain deacon's orders before the expiration of the six months, and that he was therefore ineligible. The first question is, was it necessary that deacon's orders should be obtained within six months from the first of May? The affirmation of the petitioner rests upon the following passage of the statutes:—*Quemlibet vero sic electum per sex menses manere volumus antequam in verum et perpetuum collegii socium admittatur, ut probari possit an sit moribus et scientia aptus et idoneus ad societatem dicti collegii;*
 [*527] *completis autem sex mensibus, si idoneus inventus fuerit*

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a magistro coram sociis, admittatur in perpetuum socium et omnio jura, privilegia et emolumenta ad locum socii spectantia ; sin autem post sex menses completos minime habilis et idoneus reperiatur a Magistro et sociis vel majore eorum omnium parte, a collegio penitus amoveatur. The object of this provision appears to have been to secure a period of probation of not less than six months. After the expiration of that time, but not before, the party elected may be admitted to his full fellowship ; but I find no prohibition against extending the time of such admission ; and the provision as to orders gives no limit as to six months, but says only, priusquam in perpetuum socium admittatur ; and it appears from the Master's affidavit, and from the list of admissions which he verifies, that it has not been understood that the admission must necessarily take place at the expiration of the six months, although, as might be expected, it has usually been perfected at that time, which the natural wish of the party elected sufficiently explains ; but that there was not any necessity for its taking place at that particular time, appears from the list, which shows that of sixty-nine admissions of which the dates have been preserved, seventeen were at periods after the expiration of six months from the election ; many of which were seven and eight months, one at eleven, one at fourteen, and one at seventeen months, after the election.

In the present case, Mr. Bright would have been of the proper age for deacon's orders, only a few weeks after the expiration of the six months, and might, therefore, according to the provisions of the statute, and the usage and custom of the college, have been in deacon's orders before the time of admission to his full fellowship ; but even if this were otherwise, the petitioner would still be far from establishing his proposition, that, "at the time of the election, Mr. Bright could not, [*528] on account of his age, obtain deacon's orders before the expiration of the six months ; for it is certain that the want of age might have been dispensed with by a faculty from the Archbishop of Canterbury, of which the petitioner was so well aware, that he entered a *caveat* to prevent such faculty being given.

It was admitted in the argument, that if the party elected, being competent to take orders within the prescribed period, had

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failed to obtain them from accident or the arrangements of the bishop by whom they were to be conferred, he would not be thereby prejudiced : and why do not such consequences follow where the failure arises from the act of the Archbishop? In both cases the party might have been in orders, but for the act of another person ; but how strong is the case where the party raising the objection, has himself been the wilful cause of such failure : for it seems that the present is one of the cases in which but for the *caveat*, the faculty would probably have been given.

I am, for these reasons, of opinion that the objection made to Mr. Bright's election cannot be sustained ; that being in deacon's orders at the time of admission to the full fellowship, is all that the statutes require ; and that, at the time of the election, there was no impossibility of his obtaining such orders by that time, either by a postponement of the ceremony of such admittance for a few weeks only, or, without it, by a faculty from the Archbishop, which the petitioner himself prevented him from obtaining.

The petition, therefore, both as to Mr. Conington and Mr. Bright, must be dismissed, and their elections confirmed.

[*529]

BUTLIN v. MASTERS.

1848 : Feb. 12.

It being suggested that, in consequence of the subject matter of the plaintiff's claim being an ecclesiastical due, the proceedings necessary for ascertaining his right would have to be commenced in the Spiritual Court, the order (*ante*, p. 291) was varied merely by giving the plaintiff liberty to take such proceedings (instead of bringing such action,) as he might be advised, for the purpose of establishing his right ; the court being of opinion that the peculiar nature of the demand, and of the remedy applicable to it, afforded no reason for departing from its usual course of procedure in a case in which its jurisdiction was resorted to merely as ancillary to a legal right.

THIS case (reported *ante*, p. 291) was now mentioned again by

Mr. Romilly Mr. Humfrey, Mr. Hayes, and Mr. Stinton for

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the plaintiff, stating that since the order, giving the plaintiff liberty to bring an action, was made, he had been advised by his common law counsel, that the customary payment which he claimed being an ecclesiastical due not within the stat. ed. 6, no action would lie for it, and that the remedy was in the Ecclesiastical Court; but, as the custom on which the plaintiff relied was denied by the defendants, and the Ecclesiastical Court had no jurisdiction to try the existence or validity of a custom, the only effect of commencing the suit in the Ecclesiastical Court would be that the defendant, after pleading a traverse of the custom, would apply to a court of law for a prohibition. And under these circumstances, they submitted that the more convenient course would be that which was first adopted—an issue to try the existence of the custom, and if that were found for the plaintiff, then a special case raising the question of its validity.

Sir *F. Simpkinson*, Mr. *Smythe*, and Mr. *Mellor* for the defendants, contended that the circumstances now stated did not relieve the plaintiff from the obligation *of estab- [*530] lishing his right under the custom, before he applied for relief to the jurisdiction of this court, which was merely ancillary; observing, that the whole question, both of fact and law, would be open on a declaration of prohibition, with the advantage of an appeal to a Court of Error. They also adverted to the difficulty which would be experienced in this case, as the pleadings were framed, either in directing such an issue or preparing such a case as would determine the question raised upon the record, inasmuch as the bill did not state that the alleged payment was in lieu of tithe generally, or of any particular species of tithe.

Mr. *Romilly* in reply, said he believed there was no instance of this Court having sent a party, who applied to its jurisdiction, to establish his right in an Ecclesiastical Court; and that the circuitousness of the course suggested on the other side was a sufficient objection to its adoption.

THE LORD CHANCELLOR.—The plaintiff comes here for an

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account of certain dues which he claims by a legal right. This court has no jurisdiction to adjudicate upon the legal right, and therefore it resorts in each case, to the most convenient mode of ascertaining that right. Sometimes, if the dispute turns merely upon a matter of fact, it will, to save expense, direct an issue; but where any serious doubt exists on the legality, as well as the fact, of that upon which the plaintiff founds his claim, it is more consistent with the practice of this court to do nothing till the plaintiff has established his right by a decision of the tribunal to which the adjudication of it properly belongs. That is the course pursued in cases of copyright, and that is the view in which I directed this cause to stand over, with liberty [*531] to the plaintiff to bring "an action, it not being then suggested that there was any difficulty in the way of that mode of proceeding. It now turns out that it is, at least, very doubtful whether an action will lie. But what if that be so? Why, that the plaintiff coming here prematurely, cannot bring an action to show its legal right, but must go first to the Ecclesiastical Court. That, however, is simply a misfortune in the plaintiff's case, and does not entitle him to a relaxation of the practice of the court in his favor. All that this court says is, we abstain from interfering till you can show us a legal title to what you ask. It has nothing to do with the difficulty which the plaintiff may experience in accomplishing that object. If I take on myself to direct an issue or a special case, the matter ultimately comes back to this court to decide upon: whereas, there is this great advantage in the other, which is the ordinary, course—that a question of importance, as a question of this kind must be, will be decided by the court appointed by the laws of the country for the trial of customs and customary rights, instead of coming incidentally before this court, which has properly no jurisdiction over it.

I think, therefore, that the proper order in this case will be to retain the bill, with liberty to the plaintiff to adopt such proceedings as he may be advised for the purpose of establishing his right. The necessity, if it exists, of going first to the Ecclesiastical Court, will add very little to the expense, for, it seems,

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the proceedings there will go no further than the libel, and the traverse of the alleged custom.

*In re WEBB.

[*532]

1848: Feb. 12.

The mother and guardian of an infant tenant in tail in remainder preferred to the nominee of the party interested in the personal estate of a lunatic, tenant for life, as committee of his estate.

THE Master having in this case^(a) approved of Sir S. S., who was the lunatic's London banker as the committee of his estate on the nomination of his natural daughter, in preference to the mother and guardian of the infant tenant in tail in remainder, the latter presented a petition in the nature of exceptions to the report, and the daughter presented another petition to confirm it.

It will be remembered that the daughter was sole residuary legatee under a will executed by the lunatic when of sound mind.

Mr. *Romilly* and Mr. *Buck*, for the infant remainder-man in tail.

Mr. *Parker* and Mr. *Walford*, for the daughter, contended, that the claim of a remainderman to the office of committee was much less favored than that of an heir; as the remainderman, acting in that character, was managing an estate which on the death of the lunatic was certain to be his, and, therefore, his interest to improve it at the expense of the lunatic's personal estate, was stronger than that of an heir, who had only a hope of succession which might be defeated by the lunatic's recovery, and his making a will. They also insisted that a lady was not a proper person to have the management of such large estates, and

(a) See pp. 10, 116, *ante*.

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that the interests of the remainderman would be sufficiently protected by *giving his mother notice of all proceedings before the Master relating to the real estate, with liberty to attend them.

Mr. *Romilly* on the other hand, in reply, dwelt upon the risk of the estate being allowed to go out of repair if the management of it were left to the nominee of one who was strongly interested in increasing the lunatic's personal estate.

THE LORD CHANCELLOR.—It is impossible to preserve a perfectly equal balance, where one of the parties is interested in the real estate, and the other in the personal estate; but the answer to any objection of that sort is, that, the property being in the hands of the court, all the expenditure will be under its control. The primary object of the court in these cases is to see that the lunatic's estate is well taken care of, and it cannot be denied that the remainderman has a strong interest in its good management. But the argument, here, is that, by that very interest he is disqualified; and a distinction has been attempted to be drawn between a remainder-man and an heir at law. The distinction, however, if it be one, is merely technical; there is evidently no substance in it, at least in such a case as this, where the lunatic is sixty years old, and his recovery is all but hopeless. In many cases the object of the court, to take care of the estate, could not be accomplished, if those most interested in it were to be excluded upon considerations of that kind. It is true, that the remainder-man is here an infant, and that his guardian is his mother, and it is said that a lady is not likely to superintend personally the management of the estate: but neither is a London banker who is the person proposed on the other side, and who is a perfect stranger to the *family.

I think, therefore, that the mother of the petitioner is the more proper person to have the management of the property during his minority; and that she must be substituted for the person approved by the Master; but the party interested in the personal estate must be at liberty to attend the proceedings.

1848.—*In re Webb.*

Mr. *Parker* asked that his client might be at liberty not only to attend, but to carry in proposals.

THE LORD CHANCELLOR.—No. It is quite right that she should be a party to what may be done, but not that she should actively interfere in the management of the estate.

ROBERTS v. ROBERTS.

1848: Feb. 12.

The contingent interest of a testator's widow under an ultimate limitation of personality, in the event of the death of all his children under twenty-one, "to those who would then be entitled, under the Statute of Distribution," is sufficient to make her a proper party, as co-plaintiff with the children, in a suit for administration of the estate.

It is no ground of demurrer by one defendant that a co-defendant appears by the bill to have no interest.

THIS was an appeal from an order of Vice-Chancellor Knight Bruce overruling a general demurrer to the bill.

The bill was filed for the administration of the estate of a testator, who by his will gave the residue of his personal property to his executors on certain trusts for his three daughters, who were his only children, with an ultimate trust "in the event of their all dying under twenty-one, and without having been married, for those who would then be entitled under the Statute of Distribution."

"The will contained no mention of the testator's wife, [*535] but she was joined as co-plaintiff with the three daughters, and an only sister of the testator was made a co-defendant with the executors.

The demurrer was put in by the executors on the ground, 1st, of misjoinder of plaintiffs, and 2ndly, of misjoinder of defendants, it being contended upon the word "then" in the ultimate trust, that the class of objects intended to take under it was to be ascertained, not at the death of the testator, but of the last survivor of his daughters; and that according to that construc-

 1848.—*Roberts v. Roberts.*

tion neither the widow nor the sister of the testator had such an interest in his estate under that trust as to make them proper parties.

Immediately on the case being stated,

THE LORD CHANCELLOR said: there is a great difference between the widow and the next of kin. The next of kin are unascertained. The widow is no part of a class, but entitled in her own individual right; if she dies she loses her right, but the sister can only gain a title by living. She has none now, at least according to one construction of the will.

Mr. *Swanston* and Mr. *Torriano* for the appellants, in reference to the first ground of demurrer, cited *Fowler v. James*,^(a) *Dursley v. Fitvhardinge*,^(b) *Allan v. Allan*,^(c) *Belfast v. Chester*.^(d) In support of the second ground, they referred to *Westhead v. Keene*,^(e) as an authority that a misjoinder of defendants was a good ground of demurrer, but

[536] THE LORD CHANCELLOR intimated to the counsel for the respondents that they need not address themselves to the second point, as such an objection was plainly untenable.

Mr. *Rolt* and Mr. *Lovat*, for the respondents.

Mr. *Swanston*, in reply.

THE LORD CHANCELLOR.—I give no opinion upon the construction of the will, or upon the question, whether the person, who in the absence of the children would now be next of kin, is a proper party to the suit. Not that I entertain any serious doubt upon the will, but, because if I expressed any opinion it might prejudice the interests of parties in a future stage of the suit. The only question now is, as to the widow, whether she is properly joined as co-plaintiff with her children; for the de-

(a) 1 Phill. 803. (b) 6 Ves. 251. (c) 15 Ves. 130. (d) 2 J. & W. 439.
(e) 1 Beav. 267, see 295.

1848.—*Roberts v. Roberts.*

murring parties have no right to raise any question as to their co-defendant.

Now, even assuming the appellant's construction of the will to be correct, the widow is already contingently entitled to a share of the testator's estate in the event of her surviving her children, and their all dying under twenty-one and unmarried. Nothing can prevent her taking a share, but her dying before the period arrives at which the interest of the daughters ceases. She is no part of a class, but has a separate and individual right to a portion of her husband's property not disposed of: and the will expressly says, that on the death of all the daughters under twenty-one and unmarried, the property is to go according to the Statute of Distributions. It is not a very valuable interest, but still one which the law recognizes, and *suffi- [*537] cient to make her a proper party to the suit. The testator has not actually named his wife; but he has left his property to such person as the statute shall give it to: that is the same thing; his widow if she lives being one of those persons. A testator need not actually name the individual who is the object of his bounty, provided he affords the means by which the individual may be ascertained. It is, therefore, quite immaterial, whether the wife is named or not. She is described, and that is enough. The only question is, whether the widow so described and ascertained is a proper party to a suit for securing the property. I am clearly of opinion that she is, and that this appeal must be dismissed with costs.

LENAGHAN and Wife v. SMITH.

1848: Jan. 20.

A bill by a husband and wife, in right of the wife against her father for an account, and a cross bill by the father to establish a set-off. The husband having put in a separate answer to the cross bill without leave of the court, and having filed a replication in the original suit, an order obtained by the father from the court below to stay proceedings in that suit till the wife should have answered the cross bill, was, on suspicion of collusion between the father and daughter, discharged.

1848.—*Lenaghan v. Smith*.

THE demurrer in this cause having been overruled,^(a) the defendant, John Smith, the father of Mrs. Lenaghan filed a cross bill against the plaintiffs to establish a set off in respect of certain payments alleged to have been made to Mr. Lenaghan in respect of his wife's share of the fund in question. To that bill Mr. Lenaghan on the 6th of February 1847, put in a separate answer without leave, and filed a replication in the original cause on the 10th of November 1847, shortly after which John Smith moved before the Vice-Chancellor of England that the proceedings in that suit might be stayed until Mrs. Lenaghan [*538] should have answered the *cross bill. In opposition to that motion, Mr. Lenaghan made an affidavit stating that he was unable to prevail upon his wife to put in an answer, that she was in frequent communication with her father with whom she had lately been spending several weeks, and that if in refusing to answer she was influenced by any one, it was, he believed, by her father. The Vice-Chancellor, however, made the order. This was a motion on behalf of Mr. Lenaghan to discharge it.

Mr. *Stuart* and Mr. *Bilton*, for the motion.

Mr. *James Parker*.—Mr. Lenaghan has brought himself into this difficulty by making his wife a co-plaintiff in his own suit, instead of making her as he might have done, a defendant.

[THE LORD CHANCELLOR.—Surely the way in which he has framed his suit is the obvious way, Smith being alleged to be a debtor to the estate of which she is the representative. He could not have made her a defendant without some special case, as, for instance, collusion.]

At all events, he might have avoided the difficulty by obtaining leave in the regular way before he put in a separate answer. If he had done so, Smith might have issued an attachment against the wife, or taken the bill *pro confesso* against her, which now he cannot do.

(a) *Ante*, p. 301.

1847.—*Lenaghan v. Smith.*

THE LORD CHANCELLOR.—Has Smith filed any affidavit in answer to that of Lenaghan?

Mr. *Parker*.—No; he was advised to rely on the established rule of practice: which is so well settled *that [*539] the application to the Vice-Chancellor was almost of course.

THE LORD CHANCELLOR (without hearing a reply:).—There is no doubt about the rule: but it is impossible not to suspect that this is an abuse of it. The object of the rule, as of all others, is to promote the ends of justice; but if in any particular case it be applied to pervert justice, the court will depart from it.

This is a bill by a husband and wife, against the wife's father, to recover a sum of money belonging to her in his hands; and a cross bill is filed by the father to establish a set off. Now, if the father prevails upon the wife not to put in an answer to that cross bill, the effect of enforcing the rule in such a case would be to put a stop to the whole litigation: in other words, the dealing between the father and daughter would prevent the husband from asserting his rights. The court can seldom get at positive proof of the motives which influence parties in such cases; but the course I purpose to take will, I think, have the effect of putting the motive in this instance to the test. What I shall do will be, to let this motion stand over till the first seal after this term, with liberty in the meantime, to the wife to put in a separate answer, and to Smith to issue an attachment against her as if the husband had put in his answer in the regular way by leave of the court. If the daughter does not put in an answer either voluntarily or by the compulsion of her father within that time, I shall know what course to pursue.

March 2.—On the case coming on again, an affidavit was produced from Smith, stating that he had done his best to persuade his daughter to put in an answer, but without effect, and *in reply to an enquiry from the court why he had not [*540] issued an attachment, Mr. *Parker* said, that he was unwilling to send his daughter to prison.

 1848.—*Lenaghan v. Smith.*

THE LORD CHANCELLOR.—I cannot respect such feelings when they interfere with the administration of justice.

The Vice-Chancellor's order was accordingly discharged, but, by consent, publication was stayed for a month.

HUNTER v. NOCKOLDS.

1848 ; Feb. 28

Under an order for time to answer, the defendant may put in a plea, even in abatement.

Where a defendant having obtained such an order upon grounds which would only have justified an extension of time to put in an answer, afterwards availed himself of it to put in a plea of outlawry. An order made by the court below to take the plea off the file "for irregularity" was discharged, on the ground, that whether the filing of the plea was or was not, under the circumstances, contrary to good faith, it was not irregular.

AFTER an extended time for answering had been once allowed to one of the defendants in this suit, his solicitor applied to the Master on the 28th of October 1847 for a further extension. The application was opposed, but upon the solicitor producing a document, which he said was the draft answer, and stating that he only required time to send it to be sworn at Florence, where the defendant was residing, the Master made an order, giving him a certain further time "to plead, answer or demur, not demurring alone." A few days afterwards, judgment of outlawry having passed against the plaintiff, the same defendant, instead of filing an answer, put in a plea of outlawry. Whereupon the plaintiff gave a notice of motion before Vice-Chancellor [*541] Wigram for the next seal, to take the plea "off the file for irregularity. The motion, however, was not made on that day, but was saved to the following Seal; in the meantime the plaintiff gave a notice of motion to discharge so much of the order of the 28th of October as gave the defendant liberty to plead or demur, not demurring alone, on the ground that it was, or ought to have been, the intention of the Master, having

1848.—*Hunter v. Nockolds.*

regard to the grounds on which the application for time was made, to allow time for a defence by answer, and for that only. On the following Seal the plaintiff's counsel having opened the latter motion first, and succeeded upon it, then proceeded with the other, which was also granted.

Mr. *Schomberg*, for the defendant, now moved to discharge the order directing the plea to be taken off the file, contending, first, that under an order for time to answer *simpliciter*, the defendant might regularly file a plea; *Minckuitz v. Udney*; (a) and that a plea of outlawry might be filed even by a defendant against whom an attachment had issued; *Waters v. Chambers*; (b) provided he tendered the costs of his contempt; *Foulkes v. Jones*. (c) The plea, therefore, was warranted by the Master's order, even as altered by the subsequent order of the court. But even supposing it was not, it was clearly warranted by the terms of the order as originally made, which was subsisting when the plea was put in; and, therefore, whether the filing of the plea was or was not consistent with good faith, it was at all events not irregular; and it was settled, that if a party in his notice of motion specifies irregularity as the ground of it, he cannot at the hearing of the motion resort to any other ground; *Arnold v. Arnold*. (d) As to the case of *Brooks v. Purton*, (e) on which the [*542] Vice-Chancellor rested his decision, and which would be relied on by the other side, whether rightly decided or not it was distinguishable from the present case in this—that there the plea was filed after the original order for time had been altered by the court for the express purpose of limiting it to a defence by answer, whereas here the plea was filed under the authority of an order which in terms was not so limited.

Mr. *Romilly* and Mr. *Southgate*, *contra*, relied on *Brooks v. Purton*, and stated that whatever might have been the construction, in former times, of an order for time to answer (simply,) a practical distinction had, since the jurisdiction was given to the Master, been understood to exist between an order in that form,

(a) 16 Ves. 355.

(b) 1 S. & St. 225.

(c) 2 Beav. 274.

(d) 1 Phill. 805.

(e) 1 Y. & C. C. 278. 6 Jurist 500.

1848.—*Hunter v. Nockolds.*

and an order for time to plead, answer, or demur, not demurring alone : and they contended that the defendant, having in this case availed himself of the indulgence granted to him for a purpose which was not within the contemplation of any one when the order was made, his plea was irregularly put in, and was properly ordered to be taken off the file.

In reference to the case of *Waters v. Chambers* above cited, they observed, that although it had decided that the mere issuing of an attachment for want of answer did not deprive the defendant of the right to put in a plea, yet that, by the old practice, after an attachment with proclamations a defendant has no such right, and that although that kind of process was now abolished, the defendant in this case could not have put in a plea, if he had not obtained the order for time, as the Sergeant-at-Arms would have gone against him.

[*543] **THE LORD CHANCELLOR.**—It is very important in these matters, which it has been thought proper to refer to the Masters, that care should be taken to prevent the practice from being altered in other respects, or further, than was intended, and yet from what has come out in this case, there seems reasons to apprehend that considerable looseness has lately prevailed in the practice as to orders of this kind.

There is no doubt that a party who obtains an order for time "to answer," is at liberty to plead, whether the matter of the plea be the disability of the plaintiff, or any other head of defence. And that is consistent with the rule, that even a party who is in contempt for want of answer may plead ; the reason for both rules being, that the word "answer" embraces every defence which it is competent to a defendant to make, except demurring alone. It is true that the latter rule is not universal, for it appears, that after a certain stage in process of contempt, a defendant was not by the old practice allowed to put in a plea. But that is by virtue of a special order,^(a) and the existence of such an order was a proof that the case for which it provides is an exceptional one.

Now in this case the defendant got an order, which, as sub-

(a) Beames Ord. Can. 178.

1848.—*Hunter v. Nockolds*.

sequently altered by the court, was simply an order for time to answer. So long as that order stands, it must regulate the rights of the parties: if it was improperly obtained, the party prejudiced by it should have moved in the regular way to discharge it, but while it remains, how am I to say that it means something different from what, on the face of it, is expressed?

*and that notwithstanding the established rule of practice to which I have referred, the party who obtained it had no right under it to put in a plea? It is said that it was not so understood before the Master: that may be a reason for this court setting it aside on a proper application for the purpose, but it is no reason for giving a different interpretation to the order from what the practice of the court gives it. The fault, if any there be, is with the party who allowed such an order to be taken: he should have suggested to the Master the insertion of the word "only," or something else by which the intention of the Master in making the order, or of the Judge who altered it, might be unambiguously expressed, for I am clearly of opinion that as the order now stands, it is one under which the party had a right to plead, and that it is quite immaterial whether the order stands as it did at first, or as now amended.

It is impossible, therefore, to say that the plea was irregularly filed; and the only ground on which that proceeding is now impeached is, that when the order was obtained no one thought that the defendant meant to make that use of it. But the motion before the Vice-Chancellor was to take the plea off the file for irregularity: and I have in former cases decided, and I adhere to that opinion, that those who come to the court on the ground of irregularity, must support their motion on that ground, and that they cannot, when that fails them, be allowed to sustain their application by an objection of quite a different nature. The Vice-Chancellor's order must, therefore, be discharged with the costs of the motion below.

Mr. Romilly submitted that the case of *Brooks v. Purton*, by which the Vice-Chancellor had considered himself bound, was a sufficient justification of the motion to [*545] save the plaintiff from the costs of it.

 1848.—Hunter v. Nockolds.

THE LORD CHANCELLOR.—Parties may have more or less reason for coming here : but the question is, whether those who are right or those who are wrong are to pay the costs of their doing so. The rule I always act upon is, to order costs to be paid by those who are wrong.

DAVIS v. CHANTER.

1846: Dec. 3. 1848: Jan. 27.

Where an objection for want of parties is allowed at the hearing of the cause, the plaintiff does not, by taking the usual order that the cause should stand over with leave to amend, preclude himself from appealing from the decision on the objection.

The grant of letters of administration *ad litem*, makes the grantee complete representative of the estate, to the extent of the authority which the letters purport to confer, and a decree obtained against such grantee is therefore binding upon any one who may afterwards take out general administration to the estate.

THE object of this suit was to set aside certain deeds as fraudulent, and also to set aside a decree in a former suit which had been instituted for the same purpose, but which, the present bill alleged, had failed of its object through collusion between the defendants and the plaintiffs' solicitor.

At the hearing of the cause before the Vice-Chancellor of England on the 5th of July 1841, an objection was taken by the principal defendant that the estates of Richard Chanter, Anne Chanter, and Edward Snell, deceased, three of the defendants to the former suit, and to whom the decree complained of had given costs as between solicitor and client, were not sufficiently represented by letters of administration *ad litem*, (a) which [*546] "had been granted, on the nomination of the plaintiff, to one Henry Best, a defendant. And the Vice-Chancellor having allowed the objection, directed the cause to stand over, with liberty to the plaintiff to amend by adding parties, as he should be advised.

(a) See the form of the letters, post, p. 549.

1846.—Davis v. Chanter.

Before the cause came on again Elizabeth Gard, a defendant, against whom the present bill sought an account of rents alleged to have been improperly received by her, having died intestate, the plaintiff procured similar letters of administration to be granted to the same Henry Best, of her estate, and also of the estate of one Thomas Snell, who claimed a portion of the property in question under one of the deeds, but who having assigned his interest therein absolutely to one Plymsel, another defendant, had, on that account, not been originally made a party to the suit. A supplemental bill having been filed against Henry Best in those two new characters, the cause came on again on the 16th of February 1846, when the same objection was taken to the sufficiency of those limited administrations; and though it was stated that the plaintiff, who did not stand in the relation either of next of kin or creditor to any of the deceased parties, was unable to obtain general administration to them, the Vice-Chancellor again allowed the objection with costs.(a)

This was an appeal, by the plaintiff, from both the orders.

On its being called on, a preliminary objection was taken that an order giving the plaintiff liberty to amend at the hearing implied a consent on his part which precluded him from appealing against it.

*Mr. *Stuart* and Mr. *Bagshawe* in support of the objection, cited *Beresford v. Adair*.(b)

Mr. *Cooper*, *contra*, cited *Osborn v. Fallows*;(c) *Lumsden v. Frazer*;(d) *Lidbetter v. Long*;(e)

THE LORD CHANCELLOR.—An order that a cause shall stand over with liberty to amend by adding parties is as much an adjudication as far as it goes as any other. The court says, I cannot give you relief unless you do a certain thing. Is the plaintiff to ask the court to dismiss the bill? If so, what is he to say when he comes here on appeal? He would be told, you

(a) See 14 Sim. 212, and 1 Robertson's Eccl. Rep. 273.

(b) 2 Cox, 156.

(c) 1 R. & M. 741.

(d) 1 My. & Cr. 600.

(e) 4 My. & Cr. 286.

1846.—Davis v. Chanter.

complain of the court having done what you asked it to do. What Lord Thurlow meant in *Beresford v. Adair*, when he said that such an order was always considered as made by consent, must have been that it was in the nature of a consent, being an indulgence; and if the plaintiff's record be wrong, it is an indulgence, but if right, it is any thing but an indulgence, because it subjects him to the payment of costs. That, however, is a decision which appears never to have been followed. The same objection seems to have been taken in *Osborn v. Fallows*, and though it is true that Lord Lyndhurst did not notice it, he adopted a course inconsistent with the objection, from which I must infer that he thought there was nothing in it. I am glad to have that authority for what I should have been disposed to do without it.

The objection having been overruled,

Mr. *Cooper*, Mr. *Walpole*, and Mr. *Lovat* argued, that [*548] the letters of administration in question were *sufficient according to the practice, to enable the cause to proceed, and that otherwise there would be a denial of justice, as the plaintiff was unable to obtain better ones.

Mr. *Stuart*, Mr. *Willcock*, Mr. *Bagshawe*, and Mr. *Shapter*, for several defendants, argued in support of the Vice-Chancellor's orders.

No distinction was taken in the argument between the different administrations in question, with reference to the several modes in which the estates represented by them respectively were sought to be affected in the suit; the main subject of discussion being, not whether the plaintiff could obtain the fruits of a decree from any estate so represented, against which the decree might establish a liability—as in the case of *Elizabeth Gard*, against whom an account of rents was prayed—but whether a decree obtained against a limited administrator would be conclusive upon the estate which he represented, to the extent of establishing such liability.

1846.—*Davis v. Chanter.*

The following cases were cited ; *Cawthorn v. Chalie*,^(a) *Brant v. King*,^(b) *Moore v. Choat*,^(c) *Clough v. Dixon*,^(d) *Croft v. Waterton*,^(e) *Ellice v. Goodson*,^(g) *Faulkner v. Daniel*,^(h) *Woolley v. Green*,⁽ⁱ⁾ *Re-Elector of Hesse*,^(k) *Skeffington v. White*,^(l) *Harris v. Milburn*.^(m)

Jan. 27, 1848.—THE LORD CHANCELLOR.—The effect of the two orders appealed from is, that letters of administration in the form in which they have *been granted by [*549] the Ecclesiastical Court, do not enable this court to proceed in a cause to which the person deceased was a necessary party ; and that the present case was to be treated as if the interests to which they applied were not represented at all, and consequently that there is a defect of parties.

If this be a correct view of the effect of these representations, the observation occurs in limine, that there must be in this, and in very many other cases an absolute failure of justice. It is said that the Ecclesiastical Court never grants letters of administration, except to next of kin or creditors ; and it is quite certain that in very many cases they will not grant such general letters of administration. It is for them to decide according to their course and practice when they will, and when they will not do so. Over such discretion this court has no control ; and yet it cannot be said that in all cases in which general letters of administration are refused this court is to be precluded from administering justice, and *that*, where the deceased, though a necessary party to the cause, may have had some very insignificant interest in the litigation. The evil would be so great and so irremediable by the parties, that some remedy would have been long since applied, if the practice had been really such as these orders suppose.

The first matter for consideration is the terms of these letters of administration. They grant administration of the goods, chattels, and credits of the person deceased, "limited for the

^(a) 2 S. & St. 127.^(b) 1 Wms. Exor. 328^(c) 8 Sim. 503.^(d) 10 Sim. 564.^(e) 13 Sim. 653.^(g) 2 Coll. 4.^(h) 3 Hare, 199.⁽ⁱ⁾ 3 Phillim. 315.^(k) 1 Hagg. 93.^(l) 1 Hagg. 699, 2 Hagg. 626.^(m) 2 Hagg. 62.

 1848.—*Davis v. Chanter.*

purpose only for the grantee to become and be made a party to the said original bill, and to attend, supply, substantiate, and confirm the proceedings already had, or that shall or may hereafter be had in the said suit, or in any other causes or suits [*550] which may hereafter be commenced in this "Honorable Court, or in any other court or courts between the parties to the said original bill, or any other parties touching or concerning the matters at issue in the said cause, and to obey and carry into execution all orders and decrees of the court relating to the said cause, until a final decree shall be had and made therein, and the said decree shall be carried into execution, and the execution thereof fully completed, but no further or otherwise, or in any other manner whatsoever."

Of the construction and intent of this authority there can be no question. The grantee was to attend, supply, substantiate, and confirm the proceedings in the cause, and to obey and carry into execution the order and decrees of the court relating thereto. He was, therefore, in all respects to represent the party of whose estate such letters of administration were granted. The only question must be, had the Ecclesiastical Court jurisdiction to grant such administration? for if it had, the propriety of it so doing cannot be disputed or discussed in this or in any other court, but a court of appeal. It would be the act and decree of a court of competent jurisdiction, and, therefore, binding upon all other courts until reversed. Is there then any doubt as to the jurisdiction of the Ecclesiastical Court to grant such limited administration? Whatever questions may exist as to the origin of the authority of such court over the property of an intestate, it is quite clear that in the earliest times they had the sole right of administering it: the statute 31 Edw. 3, c. 11, assumes it in providing that in case of intestacy the Ordinary shall depute the nearest and most lawful friend of the deceased to administer his goods; and Blackstone(a) says "that administrators are only officers of the Ordinary. The authority vested in the Ordinary is, for the purpose of administration, deputed to the administrator in the whole or in part: for, except

(a) 2 Comm. 496.

 1848.—*Davis v. Chanter*.

when regulated by statute or custom, what is to prevent the holder of the unrestricted authority from delegating the execution of part to another? And so is the established practice. Administration is granted during the absence or incapacity of an executor until the will be received in England, or until it be found; for the mere purpose of transferring funds into the name of the accountant-general; to receive a particular sum, to assign a trust term, for putting in an answer,^(a) or filing a bill in chancery,^(b) or, which is the present case, of substantiating proceedings in chancery; *Woolley v. Green*.^(c)

That this court will recognize and give effect to such limited administrations, appears so clearly from principle that particular authorities could hardly be expected to be found; but Lord Redesdale (176, 177, 178) gives several instances of it, and in *Brant v. King*, cited in 1 Williams' Executors, 328, the Vice-Chancellor ordered the bank to permit the transfer of funds to an administrator holding letters of administration in the same form as in the present case, saying most truly that otherwise a limited administration would be useless. In *Faulkner v. Daniel*,^(d) Vice-Chancellor Wigram says: "In principle I think it clear that where a limited administration is granted and the limited administrator is made a party to a cause, the estate of the deceased is perfectly represented, for all purposes, to the extent of the authority conferred by the letters of administration."

"I do not go through the cases which have come before the Vice-Chancellor of England upon the subject, because it is the opinion of that learned judge upon this subject that I am called upon to consider: but I must observe that his Honor, in *Croft v. Waterton*,^(a) states, as the ground of that opinion, that if general letters of administration should be afterwards taken out, the person to whom they were granted would not be bound by the proceedings in a court in which the estate was represented by a limited administrator; but there does not appear to be any ground for this apprehension. In *Harris v. Milburn*,^(b) such a limited administration as this was granted,

(a) 2 Add. 351, n. a.

(b) 1 Hagg. 93, 2 Hagg. 69.

(c) 3 Phillimore, 315.

(d) 3 Hare, 208.

(e) 13 Sim. 655.

(g) 2 Hagg. 64.

 1848.—*Davis v. Chanter.*

and afterwards a will was produced, and the executors applied for a revocation of the limited administration ; but that was refused, and the executors were ordered to pay the costs, Sir J. Nicholl saying, that in cases of limited administration, parties entitled to the general grant ought to take out a *ceterorum* representation.

I am therefore of opinion that, to the extent of the letters of administration, the estate was sufficiently represented, and that this court is bound to give effect to the grant.

[*553]

*CROCKETT v. CROCKETT.

1847: Nov. 13. 1848: Jan. 29.

A testator, by his will, directed that all his property should be "at the disposal of his wife for herself and children."

Held, reversing the decision below, that there was no joint tenancy between the widow and children ; but that the widow, though not entitled to the property absolutely, had a personal interest in it ; and, as between herself and her children, was either a trustee of the fund with a large discretion as to the application of it, or she had a power in favor of the children subject to a life interest in herself.

THE question on this appeal arose upon the construction of the following will.

"Be it known to all that this my last desire is, that all and every part of my property shall be at the disposal of my most true and lawful wife Caroline Crockett, for herself and children in the event of any unforeseen accident happening to myself, which God forbid. And I recommend the arrangement of all my affairs to my friend J. Gore."

The testator left Caroline Crockett his widow, and four infant children surviving him ; and the four children were the plaintiffs in the suit.

On the hearing of the cause for further directions, before Vice-Chancellor Wigram, in March 1842,(a) one of the children being

(a) See 1 Hare, 451.

1847.—Crockett v. Crockett.

then dead, and the other three still minors, it was declared that the children of the testator took an interest in possession in his property under the will, and it was ordered that the income should be paid to the widow during their minority, or until the further order of the court.

In September 1844, the widow married a Mr. Carter, and John Ferron Crockett, the eldest son, having attained twenty-one in December of the same year, a supplemental bill was filed by the other two children, who *were still minors, [*554] against Mr. and Mrs. Carter and John Ferron Crockett, and a decree having been made therein, the causes came on to be heard again for further directions on the 11th of January 1847, together with a petition by John Ferron Crockett, praying payment to him of an aliquot part of the fund. And by the order then made,^(a) it was declared, that according to the true construction of the will, Mrs. Carter and her children took the personal estate of the testator as joint tenants, and one fourth was directed to be paid to John Ferron Crockett, and the income of the other three fourths to be paid to Mrs. Carter on her separate receipt, for the support of herself and the maintenance and education of her two infant children during their minority, or until further order.

The appeal was brought by Mrs. Carter, both from the order of March 1842, and from that of January 1847.

Mr. *Walker* and Mr. *Busk* appeared for the appellant.

Mr. *Romilly*, Mr. *Roundell Palmer*, and Mr. *Goldsmid*, for the respondents.

The same authorities were cited as in the court below. See 5 Hare, 326.

Jan. 29.—THE LORD CHANCELLOR.—The first question to be determined is, what estate and interest the mother and her children took under *the will, and the second in what [*555]

(a) See 5 Hare, 326.

 1848.—Crockett v. Crockett.

manner, after what has taken place, such right and interest ought to be administered.

As to the first, the result of the decree and order appealed from is to decide that under the will the mother and her children were joint tenants of the property, and, therefore, that there being three children, of whom one has attained twenty-one, such one is entitled to payment of one-fourth of the fund. The income arising from the other three-fourths of the property, is ordered to be paid to the mother for the support of herself and the maintenance and education of her two infant children, a direction not very easily reconcilable with the declaration that the children took an interest in possession in the property, and that the mother and her children took the fund as joint tenants, there being no appointment of guardian, or inquiry as to maintenance out of the income, but a direction to pay to the mother, as if she had been entitled to the income during the minority of her children, subject to the charge of maintaining and educating such children.

I have not been referred to, nor have I found, any case in which the terms of a gift of personalty have been the same as in this will, but there are many in which rules and principles have been established, which appear to me to lead to the conclusion that the children do not take interests in possession in the property as joint tenants with their mother, which would give the same effect to the words as if the gift had been simply to the mother and her children, which was the case in *De Witte v. De Witte*,^(a)

and *Beales v. Crisford*,^(b) although even in such a gift [556] a very slight indication of intention that the children should not take jointly with the mother, has been thought sufficient to enable the court to decree a life estate to the mother with remainder to her children; *Morse v. Morse*.^(c) In the present case it is not a mere indication of intention, but all the provisions in the will are absolutely inconsistent with such a construction. If such had been the testator's intention, why did he not give his property to his wife and children? Why did he abstain from giving any thing to the children directly? Why did he provide that whatever they might get should come through

(a) 11 Sim. 41.

(b) 13 Sim. 592.

(c) 2 Sim. 485.

 1848.—Crockett v. Crockett.

his wife? Why did he put all his property at the disposal of his wife? Why were three fourths of it placed at the disposal of the wife, over which, if the children take as joint tenants with her, she would have no power of disposal or control whatever? It was the intention of the testator that his property should be applied for the benefit of his wife and children; but the dominion over it for that purpose, and the disposal of it in furtherance of that intention was to be exercised by the wife; but of this the decree deprives her, and deprives the children of that protection it was intended to afford to them. If the gift had been, that his property should be at the disposal of his wife, without more, she would have had the property absolutely; if at her disposal for her children, she would have a trust or a power; but in neither case would the children have had an interest as joint tenants. Can the introducing the wife as one of the parties to be benefited, destroy the estate which part of the terms of the gift standing alone would have given her, or the power which the other part created for the benefit of the children? Cases in support of each of those propositions will be found collected in *Chance on Powers*, vol. i. p. 40, and amongst *them is [*557] one, the circumstances of which are as nearly as possible the same as the present; I mean the anonymous case from *Dalison*, 58, in which a man devised lands to his wife, to dispose and emply them on herself or on his or her son or sons at her will and pleasure. It was held by Dyer, Chief Justice, Weston and Walsh Justices, that the wife took a fee simple, but that it was conditional, so that if the wife should alien to a stranger it would be a forfeiture.

This case is cited by P. Williams in his argument in *Tomlinson v. Dighton*,^(a) and by Lord Ellenborough in *Doe v. Pearson*.^(b) Other cases there are in which although no direct interest was given to the devisee, trustee, or donee of the power, yet it was considered that it was intended that such interest should be given, and the same principle therefore arose; and such was the case of *Daniel v. Ubley*, reported in several books, and stated in 1 P. W. 152. The devise was—I give and bequeath

(a) 1 P. Wm. 152.

(b) 6 East, 181.

to Agnes, my wife, my house, &c. to dispose of at her will and pleasure, and to give to such of my sons as she thinks best. The wife, by deed and livery, enfeoffed the second son in fee, which being disputed by the eldest, it was held by all the Judges, that the second son's title was good; but although they all agreed that this devise did not give to the eldest son any estate or interest in possession, they differed much as to the estate and interest taken by the wife, some thinking that she took a fee conditional, some that she took the fee with a trust, and others that she took a life estate with a power; but all concurred in thinking that the eldest son did not take any absolute interest.

[*558] "These are indeed old cases, but the principles established have been recognized in very recent decisions.

The first I refer to is one of Vice-Chancellor Wigram, *Raikes v.*

Ward,^(a) in which, under a gift to the testator's wife to the intent that she might dispose of the same for the benefit of herself and their children in such manner as she might deem most advantageous, it was most properly held that the wife did not take an absolute interest; but his Honor, after quoting many cases showing that such a bequest raises a trust for the children, said, "I have however no hesitation in stating that, to whatever extent the widow or family may have an interest in the estate, the court will not deprive the widow of the honest exercise of the discretion which the testator has vested in her, or refuse its assistance to inquire into and sanction any reasonable arrangement she may desire to make." In his judgment in that case Vice-Chancellor Wigram refers to my decision in *Woods v. Woods*,^(b) in which I held that, under a "gift of all the overplus to my wife towards her support and her family," the widow took the property subject to a trust for the family. It was not argued, and never occurred to me, that any claim could be made by any of the children for immediate payment of an aliquot part of the property; nor indeed does Vice-Chancellor Wigram appear to have entertained any such opinion when this case first came before him in 1842^(c); for at that time he only decided that the widow did not take an absolute interest in the property; but he

(a) 1 Haro, 445.

(b) 1 Myl. & Cr. 401.

(c) 1 Haro, 451.

1848.—Crockett v. Crockett.

directed that the whole income should be paid to her during the minority of the children, she providing for their maintenance and education. The part of that decree, which appears inconsistent with this view of the case, is that which declares *that the children took an interest in possession in the [*559] testator's property under his will. What precisely was intended to be conveyed by those words I do not clearly understand ; but, I presume, only that the children had such an interest in the fund as entitled them to come to the court for the protection of it, and not that they had any interest in possession independently of, and as against their mother ; for the judgment concludes with these words : " At present I can only negative the absolute claim of the defendant ;" and yet the introduction of these words in that decree seems to have led to the decree of 1847(a) rather as a necessary consequence of that declaration than as the result of a judgment upon the will. It may appear unreasonable to attribute to expressions used a meaning different from what the author of them states to have been his intention ; but yet I cannot find in the decree of 1842 any trace of the meaning attributed to the expression by the Vice-Chancellor's judgment in 1847.

I have already observed some inconsistencies which would arise in the decree of 1842, if such really were the meaning of the expressions used ; but there are other considerations strongly negating the meaning now attributed to them. In the judgment of 1842, the Vice-Chancellor referred to some observations made by me in *Woods v. Woods*, namely, that the fact, that in some cases of this description the court had ordered the fund to be paid to the trustee or donee of the power, was not to be considered as an authority in favor of the exclusive right to the property, but merely that such trustee or donee might be trusted with the dominion over the fund which the donor had intended leaving in such hands subject to any rights of the parties *intended to be benefited. This reference was made [*560] by the Vice-Chancellor in support of the opinion he had expressed, that the mother, the donee or trustee, was not exclu-

(a) 5 Hare, 326.

1848.—Crockett v. Crockett.

sively entitled. But how are these observations in *Woods v. Woods*, and the cases there referred to, consistent with the declaration of the last decree? If in the cases referred to, and observed upon by me in *Woods v. Woods*, the objects of the power or trust had interests in possession in aliquot parts of the property, independently of any act of the trustee or donee of the power, as is the effect of the decree of 1847, how can the transfer of the whole fund to such trustee or donee be explained? it would, in such a case, be a transfer to one of many parties interested in the possession of the whole fund, which, except as to the aliquot part belonging to such party, belonged absolutely and exclusively to others.

I cannot think that the declaration in the decree of 1842 necessarily led to the declaration of right by the decree of 1847; but the Vice-Chancellor expressed his opinion that it did; and therefore his having rested his declaration in 1847 upon that ground in the former decree, relieves me from much of that feeling of doubt and hesitation which would otherwise attend my differing from his Honor upon the construction which his decree puts upon the will, so far as it relates to the right of the children.

His Honor states that in 1842 he did not intend to give any opinion as to such interests; but in 1847 the declaration of such right is made to depend not upon the construction of the will but upon expressions found in the decree of 1842. Having now both decrees under my consideration, and the construction of the will being the subject for my decision, I cannot hesitate [*561] to declare that, upon the authorities and the *obvious meaning of the testator, the children are not entitled to present interests in possession in this fund; and that the declaration in the decree of 1847, and that in the decree of 1842, as interpreted by the decree of 1847, cannot be supported; and that so much of that decree, and the order directing payment of an aliquot part of it to the child who had attained twenty-one, must be reversed.

This being so, it remains to be considered what are the rights and interests of the widow and children in the fund,—a question which, if to be decided upon the terms of the will, would

1848.—Crockett v. Crockett.

be one of great difficulty, and upon which the authorities and opinions of judges have widely differed. I have, however, the satisfaction of finding that I am not in this case called upon to decide this question. The mother, according to my construction of the will and the authorities above referred to, had a personal interest in the fund; and as between herself and her children she was either a trustee, with a large discretion as to the application of the fund, or she had a power in favor of the children subject to a life estate in herself.

[THE LORD CHANCELLOR then stated the circumstances (not material to the purpose of this report,) which, in his opinion, dispensed with the necessity of further deciding, on the present occasion, what were the respective rights of the mother and children under the will; and after observing that the decree of 1842 was only intended to decide, and as he proposed to alter it, only did decide in terms, that the mother had not an absolute interest in the fund for her own benefit, without deciding any thing as to the extent of her power or interest or of the interests of the children, he directed that the declaration in the decree of 1842 should be *omitted, and that the order, directing [*562] payment of one fourth of the fund to the eldest son, and the declaration in the decree of 1847, that the mother and children took as joint tenants, and all the consequential directions, should be reversed.]

Ex parte Bass.

In the Matter of STEPHEN.

1847: May 25, 26. 1848: Feb 8.

A shareholder and member of the managing committee of a provisionally registered railway company held entitled to an order, on petition, for delivery and taxation, after payment, of the bills for the solicitors employed by such committee

A compromise of a solicitor's claim for costs, if effected under circumstances of pressure upon the client, does not oust the jurisdiction of the court to tax the bills upon petition.

1847.—In re Stephen.

Where there is a petition and cross petition, and several respondents in the one unite as co-petitioners in the other, the court will not allow such respondents to be heard by separate counsel, except so far as their cases turn upon questions distinct from each other.

In the month of July 1845, Sir George Stephen, and his partner Mr. Hutchinson, and four other solicitors not otherwise connected with them in business, were engaged by the managing committee of a railway company then recently formed, to act as the joint solicitors of the company. In the month of October following, a proposition having been entertained by the committee, for amalgamating their company with another rival company, that project was strenuously opposed by four out of the six solicitors above mentioned, including Sir George Stephen and Mr. Hutchinson; but it was ultimately adopted by the committee, and due notice thereof was given to the solicitors: four of them, however, including Sir G. Stephen and his partner, disregarded such notice; and, in direct contravention of the orders [*563] of the committee, proceeded to insert advertisements "in the Gazette, at variance with the terms on which the amalgamation had been concluded. The committee thereupon came to a resolution that the four opposing solicitors should be discharged; but as it was then about the middle of the month of November, and they were in possession of the plans and sections and books of reference, which were, by the standing orders of Parliament, required to be deposited in certain public offices before the end of that month, a negotiation was set on foot between some of the members of the committee and Sir G. Stephen, with a view to a speedy adjustment of the claims of himself and his colleagues, and an immediate delivery up of the documents in their possession. The result was an agreement, on the part of the committee, to pay the sum of 28,000*l.*, to be divided between the four discharged solicitors to certain proportions, viz. 10,000*l.* to Sir G. Stephen, 5000*l.* to each of the other three, and a further sum of 3000*l.* to Stephen and Hutchinson, being the amount of certain liabilities which they alleged that they had incurred to tradesmen and others, on account of the company; and on the day on which that agreement was come to, the fol-

1847.—In re Stephen.

lowing letter was addressed by Sir G. Stephen and his partner to the chairman of the committee :

3 *Furnival's Inn*, 18th Nov. 1845.

Dear Sir.—On having our costs settled in the form proposed, we undertake to remain neuter in all future proceedings respecting the two companies ; and also we resign our offices as joint solicitors to the company, it being agreed that an advertisement shall be published in the daily papers acknowledging that our professional services to the company have been of very great value ; but that, being adverse to the general policy of the *present board of management, we have resigned [*564] our office. On receipt of the said costs we will deliver up to you all the plans and papers in our possession, and shall be happy to assist you with any information in our power. We have the honor, &c.

Stephen and Hutchinson.

On the same day the same parties sent the following written undertaking to the committee.

"We undertake that Messrs. Cobbett and Rogers [the other two discharged solicitors] shall each give a receipt in full discharge of all costs due to them from the company, on the same terms as are contained in our letter of this day, addressed to the chairman, on receiving 5000*l.* each, being 10,000*l.* for the two.

Stephen and Hutchinson.

On the following day the 28,000*l.* was duly paid, by cheques drawn by members of the committee upon the bankers of the company to Stephen and Hutchinson, who thereupon gave formal receipts for the shares of themselves and their two colleagues, with the following memorandum subjoined :—

"It being already understood that all claims and questions are this day finally settled and for ever concluded between us and the London and Manchester Direct Railway Company, and we having severally given receipts in full of all demands upon this understanding, we promise to deliver a bill of costs with all practicable speed, the delivery of them hereafter being one of

 1847.—In re Stephen.

the conditions of the settlement, and that settlement proceeding on the basis that all differences, whether pecuniary or [*565] otherwise, are finally and amicably "adjusted by payment of the sums which we have respectively received.

Dated this 22d Nov. 1845.

(Signed) *Stephen and Hutchinson. George Stephen for P. B. Cobbett and W. Rogers.*"

This arrangement was carried into effect without any formal sanction of it by the Board of Directors; and several of the members, who were not cognizant of it during its progress, afterwards entered their protest against it.

About the beginning of the following year the committee made repeated applications to the solicitors for the delivery of their bills, in pursuance of the undertaking which they had given, but without effect; and in March 1846, several of the shareholders having instituted a suit against the members of the managing committee, for the purpose of winding up and putting an end to the company, Mr. Bass, one of the defendants, presented a petition for the delivery and taxation of such bills, with the usual prayer that, in case it should appear that they had been overpaid, the balance might be refunded; the petitioner submitting to pay what, if any thing, should remain due upon them.

The circumstances attending the discharge of the solicitors were differently represented by them and by the petitioner, the latter alleging that it was determined upon solely in consequence of their opposition to the views of the committee; the former, that it was one of the express terms of the arrangement made with the rival company; but this assertion rested upon paragraphs in the public papers, the authenticity of which was denied by the chairman and secretary of the committee, who, on being applied to by the respondents, had given them positive [*566] assurances to the contrary so late as the 31st October.

The respondents, however, further stated in their affidavit that the duties which solicitors were called upon to perform, in the early stages of the organization of a railway company, were such as could not be adequately remunerated by the ordi-

1847.—*In re Stephen*.

nary rate of professional charges allowed by the taxing officers of this court : that during the four months that they had been employed they had made great sacrifices of their general business, for the purpose of devoting their time and attention exclusively to the interests of the company, in the expectation that those sacrifices would be compensated by the profits to arise from the conduct of the subsequent proceedings in Parliament, and the conveyancing and other lucrative business which would have followed, in case those proceedings had been successful ; and that they would not have undertaken the office if they had supposed that they were liable to be discharged at the pleasure of the committee, with no other remuneration than the amount of charges which might be allowed on taxation for business actually done.

These topics were particularly insisted upon by Sir G. Stephen, as being the one whose extra-professional services had been the most extensively put in requisition : and, in reference to the settlement which he had made with the committee, he stated that it was conducted on their part chiefly by a Mr. Meteyard, who had formerly been one of that body, but had ceased to be so from the time of the amalgamation, when he was appointed their standing counsel ; that the discussion upon the terms which he (Sir G. S.) had proposed was, as he had been informed by Mr. Meteyard, adjourned by the committee from day to day, in order that all the members might have an opportunity of voting upon them, and that at that time it was never once suggested by any party that the claim of the respondents [*567] should be treated as a matter of costs in the ordinary sense of the word : but that, on the contrary, the whole negotiation proceeded on the principle of compensation generally ; and he insisted that the amount for which he had stipulated upon that principle (and his own share of which, he said, had been fixed with the entire concurrence of his colleagues) was not more than, considering the character and value of his and their services, they were fairly entitled to receive. With respect to the non-delivery of the bills, he said that it was impossible to make them out accurately without having possession of the documents which he and his colleagues had delivered to

1847.—In re Stephen.

the committee immediately upon the receipt of the money, and that they would not have parted with those documents so immediately, except upon the faith of the settlement being final and conclusive, and upon the understanding that, as the bills were wanted only as vouchers in settling with other parties, minute accuracy in them would not be required.

On the hearing of the petition before Vice-Chancellor Knight Bruce, his Honor directed it to stand over without prejudice to any question, and with liberty to the petitioner to institute such suit as he might be advised.

From that decision both parties appealed. On the hearing of the appeal petitions,

Mr. Rolt, Mr. Daniel, and Mr. Speed, appeared for the petitioner *Mr. Bass.*

Mr. Russell, Mr. James Parker, and Mr. Goodeve, for Sir G. Stephen.

Mr. Cooper for Rogers.

[*568] **Mr. Wilcock* for Cobbett: but upon his proceeding to address the court,

THE LORD CHANCELLOR said—Where there is a petition and a cross petition, I cannot allow parties, who have united together as petitioner in one, to sever and appear by different counsel as respondents in the other. It is a practice for which I cannot complain of counsel, because they can only act according to their instructions; but it is a most inconvenient one, and one which I cannot allow solicitors to take. There are four parties petitioners in one petition, who are respondents in the other: there might have been twenty more: and according to this practice, I might be compelled to sit here to hear the same thing said twenty times over, because they may choose to sever in the defence to the petition to which they are respondents. If there were really different questions I might deal with it differently; but here there is, in fact, but one question.

1847.—In re Stephen.

Mr. *Willcock* was accordingly not heard.

The principal points argued were,

1st. Whether Mr. Bass had a right, either as standing in the relation of client to the respondents, or as being only of many parties "chargeable," to apply for taxation of the bills; *Lockhart v. Hardy*.(a)

2nd. Whether, considering the peculiar nature of the respondent's claim, and the principle upon which the settlement of it appeared to have proceeded, that settlement was a transaction which the court had jurisdiction to set aside upon petition. And several cases of compromise were referred to, particularly

Whitcombe's case(b) as the strongest of them, in which [*569] the Master of the Rolls had disclaimed the jurisdiction.

In the course of the argument on that point,

THE LORD CHANCELLOR (addressing the counsel for the solicitor) said: Very little evidence of pressure will suffice to entitle a client, who has paid an excessive bill, to taxation. Suppose a solicitor has papers which his client is in immediate want of and that on being asked for them he says: "My bill is £4000, and I will not give you the papers, unless you pay me that sum;" and that the client pays it in order to get the papers; would you say that was a compromise, which would take the case out of the statute?

On a subsequent day,

THE LORD CHANCELLOR said, he had been so much startled by the argument at the bar, that he had taken an opportunity of speaking to the Master of the Rolls, who had informed him, that, as far as regarded compromises for costs concluded under circumstances of pressure upon the client, he was sure that he had never made any decision under the new Act,(c) at variance with the old doctrines of the court upon that subject.(d)

On the conclusion of the reply,

(a) 4 Beav. 224.

(b) 8 Beav. 140.

(c) 6 & 7 Vict. c. 73.

(d) See *Balme v. Paver*, Jac. 305.

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THE LORD CHANCELLOR asked Mr. *Willcock* to point out, if he could without arguing them, and points of difference between the case of his client and those of the other respondents; to which Mr. *Willcock* answered, that the only point he [*570] could state without argument *was, that his client had acted under a separate retainer from the rest, and had had a separate bill for his own services.

THE LORD CHANCELLOR (addressing Mr. *Rolt* :) Of course, if taxation be directed, you would not object to the order providing for these distinct demands; for Mr. Cobbett's bill may be quite right, while the others might be excessive.

Feb. 8th, 1848.—THE LORD CHANCELLOR.—I have looked through the many affidavits which have been made in this matter, a very small proportion of which have any reference to the questions upon which I am to give judgment. I give no opinion as to the nature, extent, or value of the services of Sir George Stephen and the other solicitors, who are respondents to this petition, or as to whether the £28,000 paid to them by the provisional committee of the company, was or was not a proper sum for the committee to pay, and for the solicitors to receive. The object of the petition is to have this inquired into by a delivery and taxation of their bills of costs, and the questions I have to decide are, 1st. Whether the relative position of the parties was such as to bring this case within the jurisdiction of this court upon matters of taxation; and 2nd. Whether what took place between the parties excludes the petitioner from calling upon the court to exercise such jurisdiction.

The affairs of the projected company were, as is usual, under the management of a provisional committee, by whom [*571] the respondents were appointed solicitors in the *spring or summer of 1845, and they were dismissed by the same authority in November in the same year, upon which occasion £28,000 was paid to them by the same authority by cheques drawn upon the bankers of the company, being a printed form used for such purposes. These facts, which are not in dispute, or certainly not in doubt, sufficiently answer that part

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of the respondent's case which insists that the provisional committee were not the clients of these solicitors, and that the £28,000 was not paid by them or out of the funds of the company.

In order to ascertain as clearly as possible what took place at the time this money was paid, it is in the first place necessary to see how much of that transaction is evidenced by writing; and first we have a letter signed Stephen and Hutchinson, to the chairman of the company, as follows:—[His Lordship then read Stephen's and Hutchinson's letter of the 18th of November to the committee and its chairman, as above set forth,]—We then have four cheques drawn by five members of the acting committee upon the bankers of the company, one for £18,000 in favor of Messrs. Stephen and Hutchinson, one for £5000 in favor of William Rogers, and one for £5000 in favor of Richard Brown Cobbett. There is then a receipt, dated London, 22nd of November 1845, and signed Stephen and Hutchinson, George Stephen for R. B. Cobbett, William Rogers, in these words: [His Lordship read the receipt.]

It is made a question upon some of the affidavits, how far some of these documents were so received and adopted by the company, as to bind them by their contents; but as against those by whom they are signed they must be taken as giving their construction of the transaction, and they appear to me to establish the *relation of solicitor and client between the [*572] parties so signing and the provisional committee; that, as such solicitors, they had in their possession plans, papers and documents, the property of their clients; that they had taken or threatened to take proceedings against the policy adopted by the committee, that they disputed the right and power of the committee to dismiss them, and that they finally agreed to abstain from such proceedings, and to deliver up the papers, and to resign their office as solicitors, upon condition of receiving £28,000 for their costs, of which no bills had been delivered, and no particulars were furnished to the committee. The receipts, indeed, are in full of all demands; but in the written evidence to which I have referred there is no mention of any demands excepting costs. The terms of the receipts are so strong, that I must suppose that they were intended to exclude any taxation of the

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bills when delivered ; but the provision of the delivery of bills of costs must have been founded upon the supposition that they would afford some justification to the provisional committee for the payment of such sums, and tend, therefore, to confirm what the documents indicate, that costs, and costs only were the consideration for the payments.

An attempt is made in the affidavits to represent that these sums were calculated and claimed, not merely as remuneration for past services, but as compensation for the loss and profits which would have accrued to the solicitors if they had not been dismissed, but had continued in the exercise of their office. The written documents negative any such supposition, and, if it could be listened to, would show how absolutely the company were in the power of their solicitors, and how that power was abused.

[*573] *The petitioner Mr. Bass, it appears, though a member of the Provisional Committee, was not a party in the first instance to the payment of these sums, but afterwards protested against it, and was at last induced to let the arrangement proceed upon a representation of the fatal consequences to the interests of the company, who were about to apply to Parliament for an Act, if the arrangement should not be carried into effect. Subsequently a bill being filed against Mr. Bass and others, complaining of the misapplication of these sums, he presents this petition to protect himself by compelling a legal settlement of the claims of the Respondents ; and the question is, whether he is entitled to this under the provisions of the Act upon petition, or whether, as the Vice-Chancellor Knight Bruce seems to have thought, it was necessary for him to proceed by bill.

It is necessary first to consider the position of Bass the petitioner, it being contended that he is not in such a position as to entitle him to ask for a taxation of the bills. The petitioner Bass, it appears, became one of the acting committee of the Company in August 1845, and has so continued ever since, and at the same time agreed to take shares to be allotted, and that, on 20th of November 1845, he agreed to purchase thirty shares of one Lee, upon which the deposit had been paid, the greater part of the

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purchase-money for which was settled in account in the December following ; and the question is, whether Mr. Bass, as a member of the acting committee, and as such a trustee for the shareholders of this property applied in payment of the 28,000*l.*, or as a shareholder himself, and as such interested in such property, is entitled to apply by petition for a taxation of the bills of costs.

*The 37th section of the 6 & 7 Vict. c. 73, gives to the [574] Lord Chancellor and Master of the Rolls, in cases in which no part of the business shall have been transacted in any court of law or equity, power to refer for taxation any bill delivered upon the application of the party chargeable, and authorizes such courts and judges, in the same cases in which they are authorized to refer a bill delivered, to make such order for the delivery of a bill, and the delivery up of papers, &c., and in such manner, as had theretofore been done where the business had been transacted in the court in which the order was made ; and the 41st section provides that payment shall be no bar, under special circumstances, of an order for taxation. The 38th section provides, that a party not chargeable, but liable to pay, or who shall have paid to the solicitor, or to the party chargeable, shall be entitled to the same reference for taxation ; and the 43d section directs, that all applications under that Act shall be in the matter of such attorney or solicitor.

Mr. Bass was a member of the acting committee from August 1845, the governing body under whose authority and direction the employment of the solicitors had taken place, and who were liable to them, or, in the terms of the Act, "chargeable ;" besides which he had, before the actual payment, become entitled to certain shares by contract with Lee, under which all rights and liabilities incident to such shares became vested in him ; he was therefore a party liable to pay, or whose money had paid the solicitor's demand. It appears to me, therefore, that Mr. Bass was a party entitled to an order for taxing the solicitor's demand, and so Vice-Chancellor Knight Bruce must have thought ; because the petition was not dismissed, which it ought to have been, if the court had been of opinion that the petitioner had no title to make the *application. I have indeed to regret, [575]

 1848.—In re Stephen.

that I have not had the benefit of any note of the Vice-Chancellor's judgment; but I must assume that the ordering the petition to stand over must have been founded upon an opinion that no decisive objection had been raised to the order prayed.

If, then, Mr. Bass was in a position to make the application, the fact of payment would be no bar; for so the act declares, and there is no evidence of any special contract as to the mode of remuneration, which has been held to exclude the right to taxation; and the only question that remains, is whether there was anything in what passed at the time of payment to exclude the summary jurisdiction of the court, and to make it exercisable only in a regular suit; for there is no question here as to any agreement before the business was done as to the manner in which the costs were to be charged, or the mode by which the amount should be ascertained, as in the case of *In re Rhodes*,^(a); nor are there in this case any facts to bring it within the authority of *Barwell v. Brooks*, *In re Cattlin*.^(b) The observations of the Master of the Rolls in that case, as to the court not having jurisdiction, upon a petition, to open a settled account, must be understood to have reference to the facts of the case, in which the amount of a bill of costs formed an item only of a settled account, the balance of which had been paid to the client, and the bill in that manner discharged. The observations cannot have been intended to apply to a case of mere settlement of a bill of costs; for that would be to repudiate the jurisdiction by petition in every case of payment, which is of itself a settlement; and the Master of the Rolls has in many cases, acting upon the [*576] authority of former decisions, "many of which were observed upon by me in *Herlock v. Smith and Waters v. Taylor*,^(c) under special circumstances upon petition opened such settlements, and directed the taxation of paid bills, as *In re Tryon*,^(d) *In re Wells*,^(e) and, though no order was made, the principle was distinctly recognized in *The Matter of Fyson*,^(f) and in *The Matter of Lees*.^(g) The refusal of the Master of the

(a) 8 Beavan, 224.

(b) 8 Beavan, 121.

(c) 2 M. & C. 495, and 596.

(d) 7 Beavan, 496.

(e) 8 Beavan, 416.

(f) 9 Beavan, 117.

(g) 5 Beavan, 410.

1848.—In re Stephen.

Rolls, in *The Matter of Whitcombe*,^(a) to direct a taxation, has been referred to, as throwing some doubt on this jurisdiction ; but the facts of that case were very peculiar, to which the expressions used by the Master of the Rolls must be considered as referring, and cannot be put in competition with the authorities I have before referred to.

If then the petitioner was in a position to entitle him to make the application, and if the connection between the parties was merely that of solicitor and client, and the account between them was merely that of costs, and if the payment and settlement of such account did not exclude the summary jurisdiction of the court, the only remaining question will be, whether there were special circumstances to authorize the exercise of such jurisdiction.

It is not a case in which the proof of errors can be required, one of the complaints being that the client has never had any account rendered, and is therefore ignorant of what it consists ; but it is a case of pressure and of undue advantage taken of the exigencies of the client's position by the solicitor, and of abuse of the power he had acquired. Of such pressure and improper dealing, the letter of 18th of November 1845, and the [*577] language of the receipts, leave but little wanting to complete the proof. They prove threats of the solicitors to act adversely to the wishes and policy of the clients, and a denial of the clients' right to dismiss them, and withholding papers belonging to them ; and a stipulation that a sum of 28,000*l.* for costs should be paid amongst the several solicitors, of which Stephen and Hutchinson were to have 18,000*l.*, as the condition of the solicitors abstaining from acting upon such assumed rights, and carrying such threats into operation ; and the evidence proves that at the time of payment, and as the reason for making it, the circumstances of the company were such as to require the immediate possession and use of the documents, which could only be obtained by submitting to the terms imposed. The agreement stipulates, in the strongest terms, that the transaction should be a final and complete settlement of all matters in difference ; but if the case be

(a) 8 Beauv. 140.

1848.—In re Stephen.

one within the jurisdiction of the court, that jurisdiction will not be ousted by the terms the solicitors have compelled their clients to adopt. The agreement for settlement provides, that bills of costs shall be delivered with all practicable speed ; but, after the lapse of two years, no such bills have been delivered.

The first thing will be to compel the delivery of the bills ; till which time the client cannot know the extent of the case he may have against the solicitors. I propose to make the usual order, where no bill of costs has been delivered.

[*578]

*HODGKINSON v. BARROW.

1847: July 11. 1848: Jan. 28.

Instance of a constructive disposition of residue.

THE question in this appeal was, whether the directions contained in two codicils to the testator's will amounted to a disposition of the residue of his real and personal estate ; or whether as to such residue, there was an intestacy. The Vice-Chancellor of England was of the latter opinion, and had so decided.

The material substance of the documents and the other circumstances of the case are, for the purpose of this report, sufficiently stated in the Lord Chancellor's judgment.

THE LORD CHANCELLOR.—By the original decree the will and two codicils of George Hodgkinson were established, and the trusts thereof ordered to be performed and carried into execution, and various inquiries were directed.

By the order on further directions of January 1847, it was declared that the said George Hodgkinson died intestate as to the reversion of his real estate and as to his personal estate not specifically bequeathed, after the life-interests therein respectively given by his will to his widow the late Frances Hodgkinson ; and directs that the surplus, if any, of the personal estate should be divided according to the Statute of Distributions.

1848.—Hodgkinson v. Barrow.

The question is, whether this declaration as to the intestacy be correct, or whether the will and codicils do *not [*579] dispose of and direct the distribution of the corpus of the testator's property.

The testator was twice married; first, to Ann, by whom he had children, the plaintiffs George and Mary Ann, who married Jackson, the father and mother of the defendant, William Jackson; and, secondly, he married Frances, by whom he had the defendant Frances Maria.

Upon his first marriage the testator executed a bond to secure £1500 for the issue of the marriage; which, partly by himself, and partly after his death, has been paid. On his second marriage a settlement was executed, by which the father of Frances, the wife, settled £3000 for the benefit of the husband, wife, and children; and the testator covenanted by settlement or will to secure all the real and personal estate he should have at the time of his death, for the benefit of Frances, the intended wife, for life, not extending to any provision for the children.

By his will, the testator, after referring to this settlement and bond, appointed his trustees to see to the fulfilment of the bond; and he directed them to stand possessed of all his lands, to hold to them their heirs and assigns forever, in trust for the purpose of the settlement, and for no other intent or purpose whatsoever. And he directed his trustees to stand possessed of his personal estate for the uses in such settlement, and no other save some small legacies, which he specified; and he appointed such trustees and his wife executors.

The real and personal estate being thus given for the purposes of the settlement, and that settlement being confined to the life estate of the wife, it is obvious that *there would [*580] have been an intestacy subject to such life interest. The question therefore depends upon the codicils.

When the testator made his codicils, he must have been aware that, although he had disposed of the beneficial interest in his real and personal estate only during the life of his wife, yet that under his will the whole legal estate and interest in both would be vested in his trustees and executors: and from the concluding sentence of his will it appears that he had con-

1848.—Hodgkinson v. Barrow.

templated some further disposition of such beneficial interest, at least as to the personalty; for, after appointing the executors, he adds, "fully confiding in them to fulfil to the utmost of their power any memorandum I may leave or attach to this paper, written verbally or in writing, signed or not signed by my hand."

Under these circumstances the testator made his first codicil, and after reciting that, upon his marriage with his wife Frances, a provision was made in the settlement for the issue (which must allude to the £3000 settled by the father of Frances) proceeds thus: "Now my request is, and I do direct, that, whatever sum or sums of money may arise and come to the child or children of that marriage, or the children of my former marriage, with the exception of such sums as may come in right of their respective mothers, that my said trustees will take the whole of my real and personal property into their consideration, and have an estimate made by such discreet person as they may fix upon; and my will is, to divide to every child its due share and proportion; also taking first into their consideration such monies as the child or children shall have received during my life towards their advancement in the world, either upon their marriage or in any other respect; and, *provided it be my son's wish, and my dear wife is consensive, to purchase or otherwise to rent the house I dwell in, that the said trustees do in that case cause a proper and reasonable value or rent to be made thereupon, and to make her the first offer before any other person whatever."

Upon the codicil the question is, whether the testator intended to dispose of the reversionary interest in his real estate, and of his personal estate after the life interest before given, or whether, as the decree declares, he died intestate as to such reversionary interest and personal estate. The first observation that occurs is, that if this be the right construction, the codicil was wholly inoperative. If the children took nothing beyond what the settlement gave them, the direction, as to their bringing their portions and advancements into hotchpot, would be inoperative; and, as the mother tenant for life under the settlement, and the son entitled to the reversion of the house as heir, might have

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disposed of it as they might have agreed, the authority given as to the house would have been equally inoperative; whereas, if he intended to dispose of his reversionary interest in his real and personal estate, both directions were operative and important; but still such intention must be manifested by sufficient expressions, and I think there is quite sufficient for that purpose.

He directs his trustees to take the whole of his real and personal property into their consideration, and to have an estimate made: "and my will is to divide to every child its due share and proportion." To divide what? his real and personal property. "Its due share and proportion" of what? his real and personal property. But how is the due share and proportion of each child to be ascertained? By reference to and [*582] taking into account what each child might have received under the settlement (except what might have come to them in right of their respective mothers,) or by way of advancement from himself. As to sums so to be taken into the account, the children would have been absolutely entitled; they must, therefore, have been considered as entitled in the same degree to the shares from which such sums were to be deducted. So the provision as to the house can only be understood as an exception from the direction to divide the whole of his real and personal property. The same observation applies to the direction in the second codicil as to the tenement which he provided for his daughters; but with this addition, that he adds that his daughters were to pay such consideration for it as his trustees should think right and proper on the general distribution of *all his affairs*; that is, that the value of such tenement should be considered as so much received by his daughters on account of their shares of his real and personal estates.

I find, therefore, a manifest intention to dispose of the reversionary interest in the real and personal estates indicated by sufficient words and expressions. I must, therefore, reverse the decree, and declare that the residue of the testator's real and personal estate was disposed of.

 1847.—White v. Briggs.

[*583]

*WHITE v. BRIGGS.

1847: Nov. 15. 1848: January 29.

Construction of the words "heirs," and "family," as applicable to dispositions of real and personal estate respectively.

A testator directed that upon the death of his wife, to whom he gave a life interest in all his property, both real and personal, his nephew, whom he named, should be heir to all his property not otherwise disposed of; but added, that, as he had had little intercourse with his nephew, and was apprehensive that his habits might require some control, whatever portion of the property might be possessed by him was to be secured by the executors for the benefit of his family. Held that the real estate was to be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee: and the personal estate upon the nephew for life, with remainder to all his children as joint tenants, with a proviso that in the event of all the children dying under twenty-one, and, daughters, unmarried, or, if sons, without issue, the personalty should be held in trust for the nephew absolutely.

JOHN WHITE, by his will dated the 7th of September 1836, after appointing executors, devised as follows:—"I give (and under this word I mean to include all lawful definitions with regard to the disposal of property,) to my dear wife, if she survives me, the full and entire use, for her life, of all my property of every description, both real and personal. After the death of my wife, my nephew Charles Herbert White of the Bengal Cavalry, son of my deceased brother Charles White, to be considered heir to all my property not otherwise disposed of; but having had little intercourse with him, and being apprehensive that his habits require some control, I direct that whatever portion of my property may hereafter be possessed by him, shall be secured by my executors for the benefit of his family. My whole estate, I repeat, is to be possessed and enjoyed by my wife during her natural life. My plate, books, pictures, prints, coins, and curiosities of every kind, with the furniture, are to be held as appendages to my house; but consumable articles, viz. —linen, china, liquors, carriages, horses, and the like, are allotted entirely to my wife's use, and together with her jewels, trinkets, and ornaments may be finally appropriated as

[*584] she pleases, with the sum of 4000*l.* in "money." [And after some directions as to the 4000*l.*, and other pecuni-

1847.—*White v. Briggs*.

ary legacies, the will proceeded thus :]—" After the decease of my dear wife, my real property, consisting of a house with appendages as before stated, and the garden in Doncaster, the field of four acres which I purchased of Mr. Broadhead, and the close of seven and a half acres which I purchased of Mrs. Childers, I leave to my nephew before mentioned, and his heirs and family. My object in purchasing the first field was to guard against the erection of houses, which would have incommoded my own residence. I leave my heirs to use their own discretion regarding it. My object in purchasing Mrs. Childers' field was to effect an exchange with Mr. Copley for a small field adjoining my garden. Mr. Copley was an assenting party to this purchase; but the negotiation between us was impeded, and his own power interfered with, by an increase in his family." [Then, after some directions as to the testator's funeral, and other matters not material to be stated, the will concluded thus:]—" My nephew will further have the benefit of my personal property variously situated, and his heirs and family after him. I shall annex a schedule of these; but again urge upon my executors to consider it an indispensable obligation to secure my estate in the nature of a trusteeship for the parties who may be interested hereafter."

The testator left his widow and his nephew Charles H. White, who was also his heir-at-law, surviving him. And at the time when the question in this appeal arose, the nephew had one son and several daughters, all of whom were parties to the suit, which was instituted for the administration of the testator's estate and the execution of the trusts of his will.

"Upon the hearing of the cause for further directions, [*585] before the Vice-Chancellor of England, it was, amongst other things, declared, that, according to the true construction of the will, a valid trust was created for the purpose of having a settlement made of the real estate and the residuary personal estate of the testator, for the benefit of the defendant Charles H. White and his family, subject to the life interest of the widow therein; and it was referred to the Master to approve of a settlement accordingly.

The Master having accordingly approved of a settlement, sev-

1847.—White v. Briggs.

eral parties filed exceptions to his report; on the hearing of which, and of the cause for further directions, the exceptions were overruled; but it was declared, that, according to the true construction of the will, the real estate of the testator ought to be vested in trustees to the use of the testator's widow and her assigns for her life, without impeachment of waste, with remainder in trust for Charles H. White for life, without impeachment of waste, with remainder in trust for all and every the children and child of the said Charles H. White, born or to be born as joint tenants in fee; and that after the decease of the widow the residuary personal estate of the testator, except the heir-looms, ought to be transferred by the executors and vested in trustees, upon trust for Charles H. White, for life, and after his decease, in trust for the child or children of the said Charles H. White born and to be born as joint tenants absolutely: but the trusts, both of the real and personal estate, were to be subject to this proviso, that, if no child of Charles H. White should be living at his death, the trustees should stand seized of the real estates in trust for Charles H. White, his heirs and assigns, and should stand possessed of the personal estate in trust for Charles H.

White, his executors, administrators, and assigns. And [586] it was referred back to the Master to review his report, and to alter the settlement, having regard to that declaration.

Two appeals were presented against that order—one by the son of Charles H. White, against so much of the declaration as related to the real estate; and the other by the younger children, as to the proviso which made the interest of all the children depend upon the contingency of one of them surviving the father.

On the hearing of the appeals,

Mr. *Campbell*, for the son contended, that the settlement of the real estate ought to have been on Charles H. White for life, remainder to his first and other sons in tail male, remainder to his daughters in tail general, with remainder to Charles H. White in fee. He observed that there were separate directions as to the settlement of the real and personal estate respectively, and

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cited *Chapman's case*(a) *Counden v. Clarke*,(b) *Wright v. Atkyns*.(c)

Mr. Walker, for the daughters of Charles H. White observed, that *Wright v. Atkyns* was no authority as Sir W. Grant's decision had been reversed by the House of Lords ;(d) and he insisted that, in this case, there were not separate directions as to the settlement of the real and personal estates; for that, taking the whole will together, there was a clear intention that they should both be dealt with in the same way; and he cited *Barnes v. Patch*,(e) *Blackwell v. Bull*,(g) *Woods v. Woods*,(h) *Pyot v. Pyot*,(i) *Gwynne v. Muddock*.(k)

*Mr. Campbell, in reply, observed, that in *Barnes v. Patch* [587] the record was not so framed as to bring the conflicting interests into opposition to each other, and therefore that the decision was of no value as an authority.

Jan. 29th.—THE LORD CHANCELLOR.—In this case there are two points which I have to consider; first, whether, as to the real estate, the Vice-Chancellor was right in declaring that after the death of the father it was divisible amongst all the children, or whether it did not, in that event, belong to the eldest son; and, second, as to both real and personal estate, whether the declaration was correct in making the interest of the children depend upon their surviving their father.

As to the first, I consider it as settled that a gift to A. for life, with remainder to his family would be a gift of it to the heir after his death. *Chapman's case*,(l) *Counden v. Clarke*,(m) *Wright v. Atkyns*,(n) *Doe v. Smith*.(o) This construction was probably adopted upon the ground that the expression implied an intention that, after the particular estate, the property should go and descend according to the rule of law; but whether this be so or not with respect to other cases, it appears to me to be

(a) Dyer, 333. (b) Hob. 29. (c) 17 Ves. 255. (d) Turn. & Russ. 146.
(e) 8 Ves. 604. (g) 1 Keen, 176. (h) 1 Myl. & Cr. 401. (i) 1 Ves. 335.
(k) 14 Ves. 488. (l) Dyer, 333. (m) Hob. 29. (n) G. Cooper, 122.
(o) 5 M. & Sel. 126.

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clear that such was the sense in which the testator in this case used the expression. He first uses expressions which unexplained, would have given the fee to his nephew; afterwards, however, he restricts the gift, but not for the purpose of [*588] diminishing its value or amount beyond what was "necessary to guard against the supposed improvidence of the nephew, and to secure the property to his family; and in these subsequent directions he twice uses the terms "heirs" or "family" of the nephew. He has in effect said that the nephew shall have the whole interest, but without the power of disinheriting his heirs; which can only be effected by making him tenant for life. The Vice-Chancellor relies upon the meaning of the word "family" as applied to Mr. Copley. The word family is flexible, and capable of different meanings. It is in this will used in two different senses; and, as we have the meaning explained by passages applicable to the same subject matter as that upon which the question arises, it is, I think, more correct to adopt such explanation, and not to resort to another passage in which indeed the same word is to be found, but applicable to a subject totally distinct; the one relating to the succession to the property, the other to the number of another person's children. Such appears to have been the Vice-Chancellor's first impression, as appears from the report.^(a) I cannot, therefore, adopt the construction which gives the freehold estate to all the children of the nephew as joint tenants in fee; but following up the rule of construction I have adopted—namely, that the testator's object was that the succession to his property should be secured as far as possible in the course prescribed by law—and finding that he has directed his trustees to secure it for the benefit of the family, and afterwards "in the nature of trusteeship for the parties who may be interested hereafter," I must adopt the construction approved by the Vice-Chancellor in page 20 of the report, where he says that the testator intended the nephew and the child or children of his nephew to take, not col- [*589] lectively, but in succession: "and I must therefore approve and confirm the report of the Master, who, as I

(a) See 15 Sim. p. 20.

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understand it (for I have not been furnished with the report) had proposed that the property should be settled, after the decease of Charles Herbert White, upon his sons successively in tail male, with remainder to all his daughters as tenants in common in fee.

As to the personal estate, I think the same principle applicable to the words "heir" or "family" as I have applied with respect to the real estate, as describing those of his family who would take by operation of law, if the father should not exercise the ordinary power of disposition which the testator deprived him of; according to which principle, all the children would take equally, and, for the purpose of securing the largest benefit to that class, would take as joint tenants: and so far I think the decree right; but I cannot see the propriety or justice of the proviso introduced as to the personal as well as to the freehold estates, that upon the death of all the children before Charles Herbert White the whole was to revert to him. If the testator had himself given no directions upon this point, the court would most reluctantly, if there had been any ambiguity, have adopted a construction so unfavorable to the children, under which they might all have married, and had families themselves, and yet have been deprived of the provision under the will by themselves dying in the lifetime of the tenant for life. But in this case the testator has expressed a wish that the property should be secured for the family. And is this the best provision for that purpose? or is it not rather giving to the nephew a power, in a certain event, over the property to the prejudice of the family, who, though by death prevented from enjoying it themselves, may have objects to effect, and duties to perform, for which *the title to [*590] this property, though subject to the life estate of the nephew, may be most essential? The only proviso which I think it reasonable to introduce, if the state of the family makes that important, is, as suggested by the exception of the younger children, that the personal estate should be held in trust for Charles Herbert White upon the death of all the children under twenty-one, and, in the case of daughters, unmarried, and, in the case of sons, without lawful issue. The joint tenancy sufficiently provides for the survivorship between the children.

I am aware that in considering the word "family" as desig-

 1848.—*White v. Briggs*.

nating heir to real estate, and next of kin as to personal, I am not adopting an opinion attributed to Lord Eldon by Sir George Cooper, in *Wright v. Atkins*.^(a) The object is to discover and carry into effect the testator's intention; and for that purpose, upon the principle I have before explained, the word "family," particularly when explained by the word "heir," is, I think, as indicative of next of kin in cases of personalty, as it is of heir-at-law in cases of real estate; and many decisions have given effect to such construction. Why then is not that rule to prevail in this case? I think the rule right in principle; and in carrying into effect the testator's intentions I am therefore bound to follow it, and disclaim any right or intention of regulating my decision by any supposed balance of fairness, with reference to other decisions, between the claims of real and personal representatives,—a ground of decision attributed to Lord Eldon in the case referred to, but which I am satisfied he never acted upon; and any expression from which such a doctrine may have been assumed, could not have been seriously used by him.

 [*591]

*FORD v. WASTELL.

1847; July 17.

The enrolment of an order absolute of foreclosure does not, any more than an enrolment of the decree of foreclosure, preclude the court from again enlarging the time in a proper case and upon the usual terms.

THE defendant in this suit was entitled under her father's will to a share of his real estate, subject to the payment of his debts; and the plaintiff had acted as her solicitor in a suit for the administration of the testator's estate: but, the defendant having changed her solicitor in the progress of the cause, he brought an action against her for the amount of his bill of costs, and, having recovered judgment, he instituted this suit as a judgment-

(a) G. Coop., 123.

 1847.—Ford v. Wastell.

creditor for a sale under the 1 & 2 Vict. c. 110 of the defendant's share of her father's real estate. At the hearing of that suit, a decree was made for foreclosure, the defendant preferring that to a sale; and, after several enlargements of the time for payment of the principal, interest, and costs, the plaintiff ultimately obtained an order absolute of foreclosure, which order was in due course enrolled; after which the defendant applied to open the foreclosure, and for a further enlargement of the time.

Vice-Chancellor Wigram, before whom the motion was made, originally declined to make the order, suggesting, that as the vacating of an enrolment was in question, the application had better be made to the Lord Chancellor.

A motion was accordingly now made before his Lordship for an enlargement of the time, and, if necessary, that the enrolment might be vacated.

"It was not disputed that the defendant's interest in the [*592] estates was worth three or four times the amount of the debt, and, upon that and other circumstances of hardship in the case, the Lord Chancellor at an early stage of the argument intimated his opinion, that, but for the enrolment, he should be bound by the authorities to grant the application. The argument was therefore confined to the effect of the enrolment.

On that point, Mr. Wood and Mr. Goodeve cited *Coker v. Beavitt*(a) and *Ismoord v. Claypool*,(b) both in the time of Charles the Second, in which it was treated as a common practice to open decrees of foreclosure, notwithstanding enrolment; also, *Kemp v. Squire*,(c) in which a decree, obtained by default, was opened by Lord Hardwicke after enrolment. *Benson v. Vernon*,(d) in which the same thing was done by the House of Lords, and *Crompton v. Lord Effingham*,(e) in which the time was enlarged, notwithstanding the order absolute for foreclosure had, as in this case, been enrolled. They admitted that enrolment precluded this court from rehearing any cause upon the merits; but they contended that an order of foreclosure absolute was not to

(a) 1 Rep. Ch. 134.

(b) Ib. 139.

(c) 1 Ves. 305, and 1 Dick. 131.

(d) 3 Br. P. C. 626.

(e) 9 Sim. 311 n.

1847.—Ford v. Wastell.

be considered as an adjudication upon the merits, otherwise the court would not on motion open such an order for the purpose of enlarging the time, even where it had not been enrolled; and yet in that case it was a common practice.

THE LORD CHANCELLOR.—The cases in which the [593] *decree* has been enrolled do not help you. The meaning of a decree in a foreclosure suit is merely that, in a certain event,—viz. non-payment of money within a time to be fixed by the Master,—the court *will* foreclose. It is the subsequent order on default of payment which creates the foreclosure, and it is that order which is here enrolled. *Crompton v. Lord Effingham* seems to be the only case in which the time has been enlarged after enrolment of the order absolute: but in that case there was another ground for opening the foreclosure, as the order absolute appears to have been made during an abatement of the suit. As to the older cases, I attach little weight to them: they are so loose. One of them, the report of which is in four lines, contains, no doubt, the whole proposition for which you contend: but I cannot act upon that.

Mr. Romilly and Mr. Randall, *contra*, cited *Pickett v. Loggon*,^(a) and *Nanny v. Edwards*,^(b) and contended that the order absolute gave the mortgagee *an estate*, which, after the order was enrolled, could only be divested, if at all, in the House of Lords.

Mr. Wood having replied, the motion stood over for the Registrar to search for authorities.

On its being mentioned again, after a long interval, no further authorities were produced, but

THE LORD CHANCELLOR said,—I think that, notwithstanding the enrolment of the order, the time may be enlarged. It is clear that an enrolment of the decree of foreclosure does not prevent it,

(a) 5 Ves. 702.

(b) 4 Russ. 124.

1847.—Ford v. Wastell.

and the only question is, whether the circumstance that here the order making *the foreclosure absolute has been *[594] enrolled, makes a difference, it being clear, that where there has been no enrolment, an order enlarging the time does not touch the decree of foreclosure. His Lordship then adverted briefly to the great hardship of the case, and the result was, that the time was enlarged on the usual terms, and *without* vacating the enrolment.

NIGHTINGALE v. GOULBOURN.

1848; January.

It is no criterion of the invalidity of a charity bequest that it is not capable of being administered in this court; for that is the case in every charity gift which is administered by the sign manual; but it is a criterion where the question is whether the gift be charitable or not.

A bequest of residue "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country *Great Britain*," held to be a good charity bequest.

And, *semble*, that the selection of a particular officer of the government as trustee marks the mode of application sufficiently to preclude the exercise of any discretion on that subject.

THIS was an appeal from a decision of Vice-Chancellor Wigram (reported in 5 Hare, 484,) on the effect of a residuary bequest in a will—"To the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country *Great Britain*."

Mr. *Romilly* and Mr. *Bell*, for the plaintiff, the appellant, who was one of the next of kin.

Mr. *Twiss*, and Mr. *Wray*, for the Attorney-General and the Chancellor of the Exchequer, in support of the decree.

The topics used in argument, and the authorities cited, were the same as in the court below.

1848.—*Nightingale v. Goulbourn.*

[*595] *THE LORD CHANCELLOR—after observing that the fund was pure personalty, and, therefore, that there was no question on the Mortmain Act, but that if the legacy was good, it was clearly a charity legacy in the large sense of that term, as adopted in *Attorney-General v. Brown*,^(a) *Attorney-General v. Heelis*,^(b) *Attorney-General v. Corporation of Dublin*,^(c)—proceeded as follows:—

Many bequests have been held good charitable gifts to parishes, towns, counties, and provinces: *West v. Knight*,^(d) *Attorney-General v. Mayor of Carlisle*,^(e) *Attorney-General v. Lord Lonsdale*,^(g) *Mitford v. Reynolds*,^(h) and so have gifts in aid of the public revenue; as in *Thellusson v. Woodford*,⁽ⁱ⁾ in which case the Attorney-General was a party, and the trusts of the will were established, and no objection raised to the gift, and in *Newland v. Attorney-General*.^(k) Why then is the present gift not good? Why is this kind of charitable gift to be held void because the particular objects are not specified, when that objection does not prevail in what have been called proper charities.

It is no criterion of the invalidity of a charity bequest, that it is not capable of being administered in this court, for that is the case in every charitable gift which is administered under the sign manual: *Moggridge v. Thackwell*,^(l) but it is a criterion when the question is, whether the gift be charitable or not, as in *Mer-*

ice v. The Bishop of Durham^(m) and many similar cases

[*596] *which have occurred since, none of which appear to me to have any application to the present.

If a gift to the government for the benefit of the public be good, can it become bad because it is given to one member of that government for the same purpose? If any objection could be founded upon the circumstance that the particular objects of the gift were not specified, the selection of an officer of the government at the head of a particular department would seem very much to diminish that objection. The Chancellor of the Exchequer for the time being cannot take the legacy for himself; but

(a) 1 Swan, 265.

(d) 1 Ca. in Ch. 134.

(h) 1 Phill. 185.

(i) 7 Ves. 36.

(b) 2 Sim. & St. 67.

(e) 2 Sim. 437.

(i) 4 Ves. 227.

(m) 9 Ves. 399.

(c) 1 Bligh N. S. 312.

(g) 1 Sim. 105.

(k) 3 Mer. 684.

 1848.—*Nightingale v. Goulbourn*.

the gift to the holder of the office strongly marks in what manner the public were to be benefited, and would probably be considered as precluding the exercise of any discretion in the application. This, however, is not now for consideration, the question being, whether the gift itself is void. I see no reason for doubting the propriety of the many similar cases which have been referred to, and if I did, thinking as I do that the present falls within the principle of them, I should be bound to follow them. I must dismiss the appeal with costs.

***THE GREAT WESTERN RAILWAY COMPANY v. THE [597]
BIRMINGHAM AND OXFORD JUNCTION RAILWAY
COMPANY and others.**

1848: January 22, 26; February 9.

By an agreement between three incorporated railway companies, A., B., and C., it was agreed that A. should purchase the other two railways when completed, and that, in the meantime, their capitals should be amalgamated for the purpose of such completion, A. undertaking to supply any deficiency: and it was provided that all the three companies should concur in applications to parliament for the necessary powers to carry the agreement into effect. At the time the agreement was entered into, B. had power, with the consent of three fifths of its shareholders, to sell its railway to A., but C. had no such power, and neither B. nor C. had any power of amalgamation. The agreement was duly ratified by three fifths of the shareholders in each of the three companies, and C. subsequently obtained an act giving it the required powers: but before a similar act was obtained by B. a large majority of its shareholders had become adverse to the project, so that no such act could be obtained; and the directors of that company, with the sanction of the shareholders, were proceeding to construct and dispose of their railway in a manner inconsistent with the agreement. A demurrer to a bill filed by A. against B. and its directors for specific performance of the agreement, and an injunction, was overruled and the injunction granted; it being clear that, for the completion of the purchase no further parliamentary powers were necessary, and it being at least doubtful whether the defendants could be heard in this court to say that the plaintiffs were not entitled to the performance of that part of the agreement, merely because there was another part (*viz.* the provision for amalgamation) which required additional parliamentary powers to give effect to it, which powers they refused to apply for.

The court will in many cases interfere to preserve property in *status quo* during the pendency of a suit in which the rights to it are to be decided: and that without expending, and often without having the means of forming, any opinion as to such

1848.—Great Western R. Co. v. Birmingham and Oxford Junction R. Co.

rights. And, in order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, therefore, the bill states a substantial question between the parties, the title to the injunction may be good, and yet the title to the relief prayed may ultimately fail.

THIS was an appeal from an order of the Vice-Chancellor of England, overruling a general demurrer to the bill, which prayed that a certain agreement for the sale of the Birmingham and Oxford Railway to the plaintiffs might be specifically performed, and that that Railway Company, and its directors, who were also defendants, might be restrained by injunction from entering into any agreement for the sale of that railway to the [*598] London and North Western Railway Company, or from in any manner dealing with such railway, or with the property or effects thereof, except with the approbation of the plaintiffs; and from doing, or omitting to do, or procuring the doing or omission of any act, matter, or thing, the doing or omission of which was or might be in breach or violation of, or repugnant to, or inconsistent with, the said agreement.

By the agreement in question, which bore date the 12th of November, and was entitled, "Heads of agreement between the directors of the Great Western Railway Company, and the directors of the Birmingham and Oxford and of the Birmingham Wolverhampton and Dudley Railway Companies, for the purchase of the said two lines by the Great Western Railway Company," it was provided, among other things, that the Great Western Railway Company should purchase both the other railways, which were only partially completed, at a premium of $10\frac{1}{4}$ per cent., payable on the 1st of July 1850, or, upon the completion of the lines, whichever should first happen; that those two companies and their respective capitals should be amalgamated, and powers taken for the broad gauge in addition to the narrow gauge thereon, and that an arrangement should be made for blending the Great Western Board with the directors of the amalgamated companies, in such manner as to give the Great Western Company an effectual control over their expenditure, it being understood that any further capital required for the completion of the two lines beyond the aggregate amount of their capitals should be provided by the Great Western Company.

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The Birmingham and Oxford Company's Act contained an express authority to the directors, with the consent of three fifths of the shareholders, to sell that *railway to [*599] the Great Western Company. But the Birmingham and Wolverhampton Company's Act contained no power of sale, and neither of the acts contained any power of amalgamation at all. But, by a deed of covenant entered into on the 2d of January 1847, between the Great Western Company of the one part, and the Birmingham and Oxford Company on the other part, and which was intended to be supplemental to the agreement of the 12th of November 1846, it was, amongst other things, expressly agreed, that the Birmingham and Oxford Company should concur in the necessary application to parliament in the ensuing session for powers to construct the railway on the broad gauge principle, and also for their amalgamation with the Birmingham Wolverhampton and Dudley Company, and for the blending of the boards of directors in such manner and for such purposes as in the former agreement mentioned.

The bill, after stating these instruments, alleged that the agreement of November 1846 was, before the end of that year, duly ratified and confirmed by general meetings, of the shareholders of each of the three companies, and that the several boards of directors were authorized to take the necessary steps for carrying it into effect. That an act was accordingly obtained during the ensuing session, giving the required powers to the Birmingham Wolverhampton and Dudley Company, and that a similar act was applied for by the directors of the Birmingham and Oxford Company; but that, in consequence of extensive purchases of shares in that company by parties connected with the London and North Western Company in the beginning of the year 1847, a large majority of the shareholders in the Oxford and Birmingham had become hostile to the proposed sale to the Great Western, and were desirous of selling or leasing *their railway to the London and [*600] North Western, so that it had been found impracticable to comply with the standing order of the House of Lords, which required the consent of a majority of the shareholders before such a bill was brought in; the consequence of which was, that the

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bill after passing the House of Commons, was thrown out in the House of Lords.

The bill then charged, that the agreement of the 12th of November was nevertheless a valid and binding agreement, and that the plaintiffs had, on the faith of it, come under heavy liabilities to contractors and others for the construction of the lines thereby agreed to be purchased, and that they had no funds available for the payment of such liabilities, which were presently becoming due, except the calls which had been made upon the shareholders in those lines, but which a majority of the shareholders in the Oxford and Birmingham Company, including six of the directors who were defendants, refused to pay, threatening also to construct their railway upon a principle different from that contemplated by the agreement, and in such a manner as would render it of no use to the plaintiffs.

On the hearing of the appeal,

Sir *F. Kelly*, Mr. *James Parker*, Mr. *Bacon*, and Mr. *Willcock*, appeared for the appellants, (the Birmingham and Oxford Railway Company.)

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Stevens*, for the respondents (the plaintiffs.)

For the appellants it was contended, 1. That the agreement was altogether invalid, being, as regarded the provision [*601] for amalgamation, one which the directors *were not by the parliamentary powers competent to enter into, and which, therefore, no majority of the shareholders, however large, could effectually ratify; and that it was a mistake to treat that provision, as the Vice-Chancellor had done, as if it was not an essential term of the agreement, but merely a part of the machinery for carrying it into effect; for, while the agreement provided that the Great Western Company should make good any deficiency in the united capitals of the two other companies for the completion of their railway, the proposed amalgamation left to those companies the benefit of any possible surplus of such capital, in case it should turn out more than sufficient for

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the purpose; so that each of them had a direct interest in that term of the agreement.

2. That even supposing the agreement not wholly invalid, it was one which this court would not enforce, for if it could not be lawfully performed without the aid of further parliamentary powers, how could this court answer for those powers being eventually obtained, not having before it the individuals whose consent was necessary for that purpose, and who, it was admitted, had resolved not to give that consent?

Feb. 9.—THE LORD CHANCELLOR.—The value of the interests and the amount of the property involved in the litigation must explain the importance which seems to have been attached to the discussion of this demurrer: for the case stated in the bill does not appear to me to raise any difficulty. The application to it of the familiar rules and practice of this court show that there is no tenable ground upon which the demurrer can be supported.

*In deciding upon a demurrer, when there are grounds [*602] for such decision independently of the real question between the parties, I think it expedient to avoid as much as possible expressing opinions upon such questions; and the bill in this case affords me the opportunity of so doing.

The bill stating an agreement for sale to the plaintiffs of the interest of the Birmingham and Oxford Company in their railway, and that upon the faith of such agreement the plaintiffs had come under liabilities for them in the prosecution of their works to the amount of several hundred thousand pounds, which sums were payable from calls upon the subscribers to the Birmingham and Oxford Company, but that such company had attempted to recede from such contract, and to prevent such calls from being so applied, and threatened and intended to sell their railway to the North Western Railway Company, prayed a specific performance of the agreement, and that the defendants might be restrained from entering into any agreement for the sale of their railway to the North Western Company, and from any other act interfering with the plaintiff's right under such agreement.

It is certain that the court will in many cases interfere and

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preserve property in *statu quo* during the pendency of a suit, in which the rights to it are to be decided, and *that* without expressing, and often without having the means of forming, any opinion as to such rights. It is true that no purchaser *pendente lite* would gain a title; but it would embarrass the original purchaser in his suit against the vendor, which the court prevents by its injunction. Such are the cases *Echloff v. Baldwin*,^(a) **Curtis v. Lord Buckingham*,^(b) *Spiller v. Spiller*,^(c) per Lord Redesdale in Dow, 440. It is true that the court will not so interfere, if it thinks that there is no real question between the parties; but seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of. In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff.

If, then, this bill states a substantial question between the parties, the title to the injunction may be good, although the title to the relief prayed may ultimately fail. Is, then, the case stated by the bill so clear in favor of the defendants, and so inadequate to support the relief prayed by the bill, as to justify the court in permitting it to be disposed of, and new titles or interests to be introduced, before any decision can be obtained upon the case so made?

As against the Birmingham and Oxford Company, the short case made by the bill is, that such company having by their Act power, with the authority of three-fifths of the proprietors present at some general meeting specially convened for the purpose, to sell and transfer to the Great Western Railway Company the said railway, or any part thereof, or any share or interest therein, they accordingly entered into an agreement for that purpose dated the 12th of November 1846, which was duly sanctioned by three-fifths of the proprietors as required: that upon the faith of such contract, the plaintiffs had come under large liabilities for the defendants, who nevertheless threatened and intended to sell their railway to the North Western, and to prevent calls being made for the purpose of discharging such

(a) 16 Ves. 267.

(b) 3 V. & B. 168.

(c) 3 Swan, 556.

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*liabilities. The demurring parties however say that al- [*604]
though, if the case were simply as thus stated, the injunction prayed might be granted, yet that there are upon this bill circumstances stated which show that the plaintiffs are not entitled to any such protection, for that the agreement of 12th November was not merely a contract between the plaintiff and the Birmingham and Oxford Company, but that the Wolverhampton Company were also parties to it, and that it provided for the sale of both the latter companies' railways to the plaintiffs, and, moreover, that they should be amalgamated, and that for the amalgamation and for the sale of the Wolverhampton railway to the plaintiffs there was not any parliamentary authority : but the bill states that, by an Act which received the royal assent on the 9th of July 1847, the Wolverhampton Company were authorized to carry the agreement of 12th of November into effect ; and it is sufficient if a good title be obtained before the Master's Report ; and as to the amalgamation, it would seem, if that were material, that the provisions for that purpose as between the two companies were confined to the period during which the works were in progress, and which were to be completed before the sale to the plaintiffs, for they would be inapplicable to the state of things after the plaintiffs had become owners of all the branch railways ; and it is to be observed that the amalgamation between the two companies had been previously resolved upon ; but, however that may be, the agreement provides expressly that all necessary powers were to be sought from parliament to give effect to that agreement.

By the appeal I am asked to treat this contract as a nullity, that is, to hold that all contracts which parties enter into not having themselves the power to carry them into effect, and therefore agree to apply to parliament to give them such power, are so utterly void, that this court will not even protect the property until an *opportunity shall have been afforded for [*605]
an application to parliament. The effect of such a decision would be to nullify very many family arrangements entered into, and many with the sanction of this court, but to give effect to which the powers of parliament are indispensable. It would also nullify all contracts by projectors of companies be-

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fore an Act was obtained ; but it is now nearly twelve years since in *Edwards v. The Grand Junction Railway Company*,^(a) I gave effect against the incorporated body to a contract entered into by the projectors of it before the Act was passed, but in contemplation of its passing, that is, a contract which the parties at the time had no power to carry into effect, but proposed to do so by the authority of parliament ; and there are now many cases to the same effect.

I am, therefore, not prepared to say, by allowing this demurrer, that a contract deliberately entered into and sanctioned is to be treated as a nullity, because some of its provisions may require an act of parliament to carry them into effect ; for the objection applies only to some of the provisions of the agreement, the substance of which is a sale by the Oxford Company of their railway for a certain ascertained consideration, to the Great Western Railway Company. Is it certain that the defendants will be enabled in this court to say to the plaintiffs you shall not have the benefit of such part of the contract as we can perform, because we cannot without an act of parliament perform the whole, and we decline to apply to parliament to give us the necessary powers ? Generally speaking, a purchaser is entitled to all the vendor can give to him with compensation for so much

of the subject agreed for as he cannot give him : of this [^{*606}] Lord *Bolingbroke's case*^(b) is a strong instance ; *for in that case a tenant in tail in remainder, upon the faith that the tenant for life would join, agreed to sell the fee, to which the tenant for life, refusing to join, he was found to be unable to make a title ; upon which Lord Thurlow ordered him to convey a base fee by levying a fine with a covenant to suffer a recovery upon the death of the tenant for life ; but I am called upon by this appeal to hold, that the plaintiffs, if they cannot obtain all they agreed to purchase, are not to be assisted in obtaining any part, and that their contract is a nullity.

I abstain from observing upon many other parts of the case which have been the subject of argument, having sufficiently explained the grounds upon which I think that the defendants

(a) 1 M. & Cr. 650.

(b) 1 Sch. & Lef. 19, n. a.

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have failed in showing that the plaintiffs have no title to any part of the relief and protection they ask; and that this is so clear, that the court ought not to interfere so far as to preserve the subject of the contest until such title can be regularly the subject of adjudication. The appeal must be dismissed with costs.

*BLENKINSOPP v. BLENKINSOPP.

[*607]

1849: March 25.

The question in the cause was, whether two of the defendants had taken a conveyance of an estate from the principal defendant, with notice of a certain proceeding in the Ecclesiastical Court, in which the bill alleged that they had acted as his solicitors. The principal defendant, by his answer, denied that they had acted as his solicitors in that proceeding, but the two other defendants, by their answer, insisted on withholding the production of certain letters in their possession as being privileged communications between the principal defendant and themselves while acting as his solicitor. On a motion for production of the documents, Held, that the plaintiff was not entitled to read the answer of the principal defendant in reply to that claim of privilege; but the motion was ordered to stand over, with leave to the plaintiffs to amend their bill for the purpose of pointing that defendant's attention to his relation to the co-defendants in reference to the particular documents, and, upon his answer to their amended bill, production was ordered.

THE plaintiff, Mrs. Blenkinsopp, having obtained a decree in the Spiritual Court for alimony, filed this bill to give effect to it against certain estates of her husband, which he had conveyed, pending the suit in the Ecclesiastical Court, to Messrs. Fenwick and Trotter upon certain trusts, the bill alleging that the conveyance had been made with a view to prevent the plaintiff from enforcing her decree by a sequestration, and that Fenwick and Trotter had taken it with notice of the proceedings in the Ecclesiastical Court from having acted therein as the solicitors of Mr. Blenkinsopp.

Mr. Blenkinsopp, by his answer, admitted that Fenwick and Trotter had occasionally acted as his solicitors in other matters, but denied that they had so acted either in the suit in the Ecclesiastical Court or in the present suit, and, in answer to the usual

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interrogatory as to papers, &c., he stated that he had not in his custody, possession, or power, any documents relating, &c.

Fenwick and Trotter, however, by their answer set forth a schedule of letters and other documents in their possession relating &c., but added that they came into their possession as the solicitors of Blenkinsopp, and they submitted that they ought not to be compelled to produce them.

[*608] *The plaintiff then amended her bill by introducing a charge, which she required Fenwick and Trotter to answer, that Mr. Blenkinsopp repudiated their assumed character of his solicitors in relation to these documents; but Mr. Blenkinsopp was not required to answer the amendment. And upon a motion for the production of the documents, notice of which was also served also on Mr. Blenkinsopp, the plaintiff's counsel proposed to read Blenkinsopp's answer to the original bill in reply to the claim of privilege set up by the other defendants. But the Master of the Rolls was of opinion that the answer could not be used for that purpose, and he refused the motion as against the trustees with costs.

The plaintiff now moved to discharge that order and for production of the documents.

Mr. *Glasse* for the motion.

Mr. *Purvis* for the trustees.

Mr. *Roupell* and Mr. *Dickenson* for Mr. Blenkinsopp.

THE LORD CHANCELLOR.—The Master of the Rolls cannot have meant to say that if one defendant says, "I have documents in my possession, but they belong to a co-defendant," and that co-defendant either puts in no answer, or says that he has nothing to do with them, the court is to be baffled by that course of proceeding between two defendants. But the defect of the plaintiff's case here is, that although Blenkinsopp in his answer repudiates any present connection with the other defendants, there is no repudiation distinctly applicable to these particular documents. For there was no specific reference to them in the

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original *bill, and he has not been required to answer the [*609] amendment. Before I make any order, I should like to know what he says when his attention is particularly directed to these documents ; and for that purpose, let the motion stand over that he may have an opportunity of putting in an answer to the amendment. If he does not answer, I shall know what course to pursue.

Mr. Blenkinsopp put in a further answer qualifying the statements in his former one, and claiming the benefit of the privilege ; but

THE LORD CHANCELLOR, being of opinion, upon the two answers taken together, that he had not established such a connection between himself and the other defendants in relation to the documents as to entitle them to protection, made an order for their production, and discharged the order of the Master of the Rolls.

ARROWSMITH v. HALL.

1848: May 4.

The rule that this court will not allow its process to be inquired of in a court of law is only for the protection of the party who has been instrumental in enforcing it, and does not give the party complaining of its exercise a right to elect between a reference to the Master and an action at law.

THIS was a motion to discharge an order of Vice-Chancellor Knight Bruce, referring it to the Master to inquire what amount of compensation was due to the defendant for having been, as he alleged, illegally detained under an attachment issued against him by the plaintiff ; the order being made on the application of the defendant himself.

*The facts appeared to be—that the attachment was [*610] issued for want of an answer ; that the defendant was taken under it, but immediately discharged on bail ; that before

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he had put in a complete answer, or cleared his contempt, but some time after the writ of attachment had been returnable, he was taken again under a writ of *ca. sa.*, at the suit of another party for a debt, which however was speedily satisfied, and he entitled to his discharge ; but that the sheriff's officer, on searching in the office to see whether there was any other detainer against him, found the writ of attachment, and, not advertg to the circumstance that it had ceased to be operative, detained the defendant under it for about two hours, until he had given fresh bail.

Mr. *Swanston* and Mr. *Tripp*, for the motion, stated, that though there were many cases in which references of this kind had been made by parties who were threatened with an action for an alleged abuse of the process of this court, this was the first case of the kind in which the application had come from the party complaining of the abuse ; that in this instance, if any one was to blame, it was the sheriff's officer, for putting in force a writ which had ceased to be operative, and not the plaintiff, who had given him no instructions for that purpose ; and that they had pressed the Vice-Chancellor to leave the defendant to his action, but that his Honor had refused to do so.

THE LORD CHANCELLOR.—It is true that this court will not generally allow a complaint against its process to be tried at law ; but if the party against whom the complaint is made is desirous of having it so tried, I never heard that this court would prevent him.

[*611] *Mr. *Russell* and Mr. *Daniel*, *contra*. The plaintiff was to blame for leaving the writ in the hands of the sheriff after it had become returnable.

THE LORD CHANCELLOR.—The return of the writ is not for the benefit of the party against whom it issued, but of the party issuing it, in order that he may, if necessary, take some further step upon it. If it remained in the office after it was return-

able, it was inoperative, and it was the officer's fault to put it in force.

Mr. Russell.—If the defendant had brought an action, it would have been a contempt. His only course was to apply for a reference, or for leave to bring an action.

THE LORD CHANCELLOR.—That is not what you did. You said nothing about an action, but they offered it.

Mr. Daniel.—The question on which the right of action will turn, will be whether, according to the practice of this court, the plaintiff was justified in leaving the writ in the hands of the sheriff's officer after it had become returnable; and that is a more fit question for the Master than for a jury.

THE LORD CHANCELLOR (without calling for a reply).—In this case the attachment was clearly inoperative from the time the sheriff's officer had dealt with it by taking the party. The officer, however, did use it again, and the consequence was that the party was kept in custody a short time longer than he would otherwise have been. The plaintiff was right in issuing the attachment, and the sheriff acted on it in the first [*612] instance correctly, but afterwards, without any further authority from the plaintiff, he made an improper use of it. Now the plaintiff had a right to presume that the public officer knew his duty, and, therefore, it is not easy to understand how the plaintiff can be answerable for a detention which was a breach of that duty. The defendant, however, comes and asks this court for compensation for that detention, and asks it against the plaintiff. It is quite true that this court will not allow a question as to its process to be tried by a court of law without its permission; but if the party complained of submits to that mode of trial, there is no objection to it; but, on the contrary, it seems to be the most proper course, particularly where it is a grave question, whether the person who complains is entitled to any compensation at all from the party against whom he asks it.

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As to the costs, the application is now converted into a motion for liberty to bring an action. If it had been that at first, it seems the plaintiff would not have objected. The proper course, therefore, will be to discharge the Vice-Chancellor's order, with liberty to the defendant to bring such action as he shall be advised, and reserve the costs of the motion.

[*613]

*CURLING v. FLIGHT.

1848; May 4, 5.

The purchaser of shares in a mining company is not entitled to a regular abstract of title to the mines themselves as if he were purchasing a share in the land in which they are worked; but he is entitled to such evidence of the constitution of the company and of the nature of the title under which the mines are worked, as will shew that the subject matter of the purchase is what it professes to be, and that the proposed form of transfer to him will give him a valid title to the shares.

Where, on a reference as to title, the Master has reported in favor of the title, but, upon exceptions, the court thinks he has done so erroneously or on insufficient grounds, the course is to give the respondent the option of a reference back to the Master to review his report.

THE object of this suit was to compel specific performance of a purchase by the defendant, at public auction, of certain shares in several mining companies in Wales and Cornwall.

The only question upon the pleadings being as to the title, that question was referred to the Master in the usual way upon motion. The Master reported in favor of the title; but exceptions were allowed by Vice-Chancellor Wigram, on the ground, as it was stated at the bar, that the evidence of title which had been adduced was at most only evidence of the vendor's title to the shares as between himself and the other shareholders in the several companies, and that no title had been shown to any of the mines themselves.^(a)

This was an appeal from that decision.

(a) See 6 Hare, 49, from which it would appear that this statement of the ground of his Honor's decision was not quite accurate.

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The shares were described in the particulars of sale, thus :—

One 200th part or shares in Botallack Tin and Copper Mine near Land's End, producing very rich *ores, which [*614] have of late years returned a profit of about 12,000*l.* per annum.

It appeared from affidavits made by the auctioneer, and by the pursers and book-keepers of the different mining companies in question, that all the mines were worked upon what is called the cost-book principle ; the names of the shareholders being entered in a book called the cost-book, with the number of their respective shares, according to the amount of which the profits and losses of the concern were at stated intervals apportioned between them ; and that the only mode in which shares in such companies were transferred, was by substituting the name of the transferee for that of the transferor in the cost-book, the authority for such substitution being in some instances the deposit in the company's office of a formal deed of assignment, and in others, merely a written or verbal direction to the purser or book-keeper from the transferor, and a like verbal or written acceptance of the shares by the transferee. The affidavits further stated, that the entry of a party's name so made was the evidence of his title to the shares set opposite to it, and the only evidence that it was customary to require.

The other evidence laid before the Master, consisted merely of verified extracts from the several cost-books, showing that the shares in question were standing in the name of the vendor, with affidavits by the pursers or book-keepers of the different mines, that the vendor was the actual owner of such shares. In one or two instances, verified copies were also produced of the deeds of transfer or other instruments which had authorized the transfer of the shares to the vendor ; and it had been intimated to the purchaser that he might inspect the originals at the office where they were deposited, *at the vendor's expense. [*615] It was also in evidence, that the defendant had on former occasions purchased shares in these mines, or in others worked upon the same principle, without obtaining or requiring any further or other title than that now offered.

Mr. *Wood* and Mr. *Tillotson*, for the appellant, contended

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that the purchaser had no right to require any title to the mines themselves : the shares, which were alone the subject matter of the sale, being merely interests in the profits and losses of trading partnerships, passing as chattels to the personal representatives of the owner, although the mines might be worked under a freehold title : that it had been decided again and again that such shares were not interests in land either within the Statute of Frauds or the Statute of Mortmain : *Forster v. Hale*,^(a) *Bligh v. Brent*,^(b) *Bradley v. Holdsworth*,^(c) *Shepherd v. Keatley*,^(d) *Attorney-General v. Giles*,^(e) *March v. Attorney-General*,^(g) *Thompson v. Thompson*,^(h) *Tredwen v. Bourne*.⁽ⁱ⁾ And they relied on the notoriety of the custom in reference to the transfer of shares in mines of this nature, and on the fact that the defendant had recognized and acted on that custom in his former purchases.

They also complained that the Vice-Chancellor had not, instead of simply allowing the exceptions, given the plaintiff an opportunity of making a more complete title by a reference back to the Master, stating that his Honor had laid it down as the proper practice in such cases, where the original reference [*616] was upon motion, "to put the party who wished for a reference back, to make a special case for it by a new motion."^(k)

The *Solicitor-General* and Mr. *Rogers* for the respondent, did not press their claim to a regular abstract of title to the mines, but insisted that the purchaser was entitled to such further information respecting the nature of the different undertakings and the constitution of the companies, as might satisfy him, before he paid his purchase money, that the mines in which the plaintiff had professed to sell shares really existed, and that what he called

(a) 5 Ves. 306.

(b) 2 Y. & C. 268.

(c) 3 Moo & W. 422.

(d) 1 Cr. M. & Rom. 117.

(e) 5 Law J. N. S. 44.

(g) 5 Beav. 433.

(h) 1 Coll. 381.

(i) 6 Mees. & W. 461.

(k) The Reporter has been informed that the Vice-Chancellor was misunderstood on this point, and that he never intended to lay down the rule of practice at variance with that stated by the Lord Chancellor.

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shares were something more than mere inscriptions of his name in certain books.

THE LORD CHANCELLOR.—It having been stated yesterday that the Vice-Chancellor Wigram had held that, where, upon exceptions to a Master's report, finding that a good title has been shown, the court is of a different opinion, it is not competent for the court to refer the matter back to the Master at once, but that a new application is necessary for that purpose. I have since spoken to other judges of the court, and I cannot learn that any such rule of practice exists. On the contrary, I think that, in a case where the vendor is desirous of having an opportunity of making out a better title, it is much more correct to deal with the report in the view, that the Master has not fully performed the duty imposed upon him; that he has come prematurely to a conclusion in favor of the title; and, therefore, to send it back to him for further investigation. It seems to me that there is no reason for beginning again, as if the matter had been [*617] once concluded; but that it is much more reasonable to treat it as not concluded, and to put it at once into a train of further inquiry. And I see no reason why the same practice should not prevail, whether the original reference be made on motion or by decree. In both cases, if the vendor wishes for an opportunity of making a better title, the court should give him the option of doing so, and only conclude the matter when the vendor says he can go no further.

On Mr. *Wood* proceeding to reply,

THE LORD CHANCELLOR said,—What the defendant now asks, is not evidence of title to the mines considered as land. That has been very properly given up, for the cases have sufficiently established that a purchaser of shares in such concerns is something very different from a purchase of the land, or of a share in the land in which they are carried on. All the defendant now asks, is some evidence to show, first, that there is a mine; and next, what is the nature of the right or title under which it is worked. It is really meant to be said, that nothing

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is necessary to be shown, but the substitution of one name for another in a book? The book purports to be a register of shareholders: but shareholders in what? That remains wholly unexplained. It is possible that the consent of directors may be essential to the validity of a transfer, and when the name of the purchaser has been substituted, he may find out that he has got no title. That may be one consequence of not giving him any information as to the constitution of the company. These may be mere fanciful objections to get rid of the contract. I do not say they are not; but whether that be so or not, the case must be decided upon general principles.

[*618] *Mr. *Wood*, in reply.—It does not appear that any deed or instrument regulating any of the concerns exists. The defendant ought at least to give some affirmative evidence of it before he calls upon the plaintiff to prove the negative.

THE LORD CHANCELLOR.—I do not go the length of the Vice-Chancellor, as to the nature of the interest to which this contract refers. Indeed it is not now contended that the same title is to be made as if the sale had been of so much land: but the question is, whether the vendor has done all that he ought to do for the satisfaction of the purchaser, considering the nature of the property sold. The extent of the information given varies with the different mines; but in none is it shown satisfactorily what is the origin of the plaintiff's title. In some of the mines, it appears that deeds of transfer are executed previously to the entry of the purchaser's name in the books. These deeds, however, are not produced, though they are the instruments under which the vendor derives his own title. In other cases it is said, that the entry of the name in the book is the only formality, and the plaintiff's contention is, that that is conclusive evidence of title; in other words, the officer of the company is to have power to create an interest, and no evidence is to be given of the authority under which he acted. It cannot be said, that a purchaser is to be satisfied with that. The effect of the different modes of transfer cannot be judged of without knowing something of the authority by which they were established; and

1848.—*Curling v. Flight*.

the vendor has not given that information which, for any thing that yet appears, must be presumed to be within his reach. I give no opinion as to the detail of what *is to [*619] be given: for it would be impossible to do so without having more information than has yet been afforded. The proper course, therefore will be to send the case back to the Master. The order will be—the Master having reported that a good title to the shares has been shown, and, the court being of opinion that a good title has not been shown, refer it back to the Master to review his report.

GROVE v. BASTARD.

1848: May 6.

In a suit for specific performance by a vendor whose title was derived under a suspicious will, it appearing that the heir had failed in an action of ejectment, and afterwards in a motion for a new trial, the Master reported in favor of the title, and the Vice-Chancellor confirmed the report, and decreed specific performance without requiring the plaintiff to establish the will. But the Lord Chancellor, on appeal, reversed that decision, holding that it was more consonant to the principles of this court that the validity of the will in such a case should be conclusively determined, if possible, between the vendor and the heir than that it should be left to be litigated between the heir and the purchaser after the purchase money should have been paid.

THIS was a suit for specific performance. The vendors were trustees for sale, under the will of a testator, who, by his will, which was executed during his last illness and within a few months before his death, after leaving inconsiderable legacies to his mother and brothers and sisters, devised and bequeathed the great bulk of his property to the plaintiffs, upon certain trusts, for the benefit of the solicitor who drew the will and his two children, one of whom was the testator's godchild.

The testator died in 1844.

After the plaintiffs had contracted with the defendant for the sale of the property, the testator's heir-at-law brought *an action of ejectment for it, on the ground that the [*620] will had been obtained fraudulently and by undue in-

 1848.—Grove v. Bastard.

fluence; but, at the trial in July 1846, a verdict was found for the defendants (at law,) and a motion for a new trial was, in June 1847, refused. In the mean time the present suit had been instituted against the purchaser, who had refused to complete, on the ground of the suspicion attaching to the will, and the claim set up by the heir. The usual reference having been made as to title, the Master, by his report, dated the 16th of June 1847, found that a good title to the property had been shown before the filing of the bill, and exceptions to that report were overruled by Vice-Chancellor Knight Bruce, and a decree pronounced for specific performance with costs. On an appeal by the defendant from that decision,

Mr. *Pulvis* and Mr. *Willcock*, for the appellants, contended that the will was of too suspicious a character to justify the court in forcing upon a purchaser a title derived under it, *Raworth v. Marriott*, (a) observing, that, although the heir had failed in his first attempt to impeach it, he might bring another ejectment in which he might be more successful. They also commented on some apparent inconsistencies in a declaration in the nature of an affidavit, which was set out in the report as having been made by the solicitor about the time when the will bore date, to the effect that he had very reluctantly inserted his own and his children's names by the testator's express direction, and, after having used his best endeavors to dissuade the testator from disinheriting his near relations in their favor.

[*621]. In answer to an inquiry from the Lord Chancellor, whether the defendant was willing to wait until the plaintiffs should have established the will, they said that he was, and that they had asked for that security to their title in the court below, but that it had been refused.

Mr. *Malins* and Mr. *Rasch* for the plaintiff, contended, that, after what had taken place at law, the mere suggestion that the heir might renew his attempt, formed no valid ground of objection to the title; *M Queen v. Farquar*, (b) *Osbaldiston v. As*

(a) 1 M. & K. 643.

(b) 11 Ves. 467.

1848.—Grove v. Bastard.

See, (a) Green v. Pulsford. (b) They also attempted to show that there was no inconsistency in the attorney's declaration, and even relied upon it to remove suspicion.

THE LORD CHANCELLOR.—It is always a painful duty for the court to have to decide on a title in the absence of the party interested in disputing it. Generally the court has no means of escaping from that duty; and in such cases it must take upon itself to form an opinion whether the objection suggested is of a sufficiently serious nature to render it inequitable to force the title upon a purchaser in the face of it; and the question is always, what is the value of the objection. I fully concur in the decisions which have been referred to. In both the same difficulty arose, and in both the court had no means of concluding the party, by whom it was suggested that a claim had been or might be made.

The courts in this country have not the power which the courts in Scotland have, of settling such questions *by [*622] *declarator*; but in this particular instance this court has in effect the power of a Scotch declarator, for it has the power of bringing the question raised by the third party to the test. I have here a will prepared by a solicitor, taking benefits under it to himself and his children, to the exclusion of the testator's own family. That may be quite right, though it is impossible not to regard such a transaction with some degree of suspicion. The declaration of the party has been referred to for the purpose of removing that suspicion; but I think the declaration makes the matter worse than before. At all events, the heir-at-law insisted that the will was one which ought not to stand, and brought an ejectment. The Master states the action, that the heir failed, and that a motion for a new trial had been refused. That undoubtedly raises a strong presumption against the heir, and the Master accordingly finds that a good title had been shown. If there were no other means of disposing of the case, and I was obliged to say whether, under these circumstances, the objection ought to prevail, I should feel considerable hesitation in saying

(a) 1 Russ. 180.

(b) 2 Beav. 70.

 1848.—*Grove v. Bastard.*

that it should not. In *Green v. Pulsford* there was only a claim, not followed up by any act, and without any fact being stated as a foundation for it; and the Master of the Rolls says, "I cannot think this of itself sufficient to entitle the plaintiff to say the title is not a good one, or that the agreement ought not to be specifically performed. If, however," he proceeds, "it were possible to institute any inquiry as to the facts which took place, I think it ought to be done for the satisfaction of the purchaser, but I do not see how that can be." That is an authority, that if there are means of bringing the objection to a test, the court will do so before it compels the purchaser to take the title. In this case I have the means, by requiring the vendor to file a bill to establish the will against the heir. In that way the [*623] "question will be speedily and conclusively determined.

If, as soon as the bill is filed, the heir puts in an answer abandoning his claim, the cloud will be removed at once, and the question set at rest for ever. If, on the other hand, he insists on an issue, it is much more in accordance with the practice of this court that that question should be tried between the heir and the devisee than between the heir and the purchaser, after he has paid the purchase-money. Let the cause, therefore, stand over for that purpose, with liberty to apply.

SOWDON v. MARRIOTT.

1848: June 13.

The Lord Chancellor does not, by varying an order or decree upon appeal, take possession of the cause in its ulterior stages: but subsequent proceedings go on in the court below as if his Lordship's order had been made there.

THE object of this suit was to enforce the covenants of a certain deed. The defence was that the deed was usurious, and Vice-Chancellor Knight Bruce, before whom the cause was heard, being of that opinion, dismissed the bill.

On appeal, the Lord Chancellor reversed that decree and ordered that the bill should be retained, with liberty to the plain-

1848.—*Sowden v. Marriott*.

tiff to bring an action. The action resulted in a verdict for the defendant, whereupon the cause was restored to his Lordship's paper of appeals. On its coming on, to be finally disposed of,

THE LORD CHANCELLOR said—If this case is to come before me, so might every other in which I vary the decree of the court below. When I do so, I merely make the order which I think the court below ought to have made. Whatever is consequent upon *that order must be brought before that [*624] branch of the court, and not here.

His Lordship accordingly refused to hear the case.

NEWTON v. RICKETTS.

1848; March 11.

If one of two plaintiffs appears in person, the other cannot be heard by counsel; for co-plaintiffs cannot sever, nor can the same party be heard both in person and by counsel.

THE plaintiffs in this cause were Mr. Newton, a barrister, and his wife. On the hearing of an appeal motion, Mr. Newton opened the case, and commenced by stating that he appeared in person in support of the motion. After he had sat down, Mr. Cooper was proceeding to follow him on the same side, but was stopped by the Lord Chancellor, who said, that co-plaintiffs could not sever, nor could the same party be heard both in person and by counsel; and, therefore, whether Mr. Cooper appeared as counsel for both the plaintiffs, or for Mrs. Newton only, he could not be heard. But it appearing, on examination of Mr. Cooper's brief, that he had been instructed to appear "with Mr. Newton for the plaintiffs," and Mr. Newton having explained that he had used the expression which had escaped him inadvertently, intending to appear as counsel, and not "in person,"

THE LORD CHANCELLOR said—Had Mr. Newton not stated at the commencement of his speech that he appeared in person,

 1848.—*Newton v. Ricketts*.

I should not have inquired whether he was the same person as the party to the record, but should have assumed that he appeared as counsel, and in that character I should not have allowed him to go into many of the topics which he introduced into his speech, and which, but for the indulgence that is generally shown to parties who appear in person, would have been disorderly and improper. But as he now states that he used the expression inadvertently, without being aware of the sense in which it would be taken, it would be harsh to enforce the rule against him in this case; and therefore, under the particular circumstances, I will hear Mr. Cooper; but upon the understanding that it is not to be drawn into a precedent.

EDWARDS v. SALOWAY.

1848: June 16.

Under a gift of residue to the testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or will, and a gift, in default of such appointment, to her next of kin as in case of intestacy: Held, that the gift of the principal had not lapsed by the death of the wife in the testator's lifetime, but that her next of kin, according to the statute, were entitled to the benefit of it.

EBENEZER SALLOWAY, by his will, dated the 4th of December 1837, after bequeathing several legacies, gave the residue and remainder of his real and personal estate to two trustees whom he named, in trust to invest the same, and to pay the income to his wife Martha, during her natural life, with a declaration that her receipts alone should be good discharges to the trustees for such income; and that the same should not be subject, or liable to the contracts, debts or engagements of any future husband she might marry; and from and after the death of his said wife, then as to one moiety of such residue upon trust for such person or persons, and in such manner and form, as his said wife should by deed or will appoint; and in default of such appointment, he directed that the same should be received and enjoyed by, and he thereby gave the same unto, between, and amongst her next

1848.—*Edwards v. Salway.*

of kin, as in case of distribution of intestate's effects. And after disposing of the other moiety of the residue to other persons, he appointed his wife sole executrix of his will.

"The testator's wife died in the year 1839, in his life- [*626] time; and, on his death in the year 1846, his two brothers took out administration, with the will annexed, to his estate.

The suit was instituted by some of the next of kin of the wife, for payment of a moiety of the residue under the above-mentioned clause in the will.

The defendants, the administrators, put in a general demurrer to the bill, insisting that that moiety had lapsed. The demurrer having been overruled by Vice-Chancellor Knight Bruce,

The defendants appealed from that decision.

Mr. *Humphrey* and Mr. *Craig*, for the appellant, contended that the paramount object of the testator in the gift in question, evidently was to benefit his wife, and that his only motive for qualifying the gift as he had done, was to secure to her the enjoyment of it, in the event, which he anticipated, of her contracting a second marriage; that it was unreasonable to suppose that his wife's next of kin being an unascertained class, were themselves objects of his bounty, or that he could have intended them to take anything but what his wife should have the power to deprive them of by an appointment. They relied on *Baker v. Hanbury*,^(a) decided by Sir John Leach V. C., and affirmed on appeal by Lord Lyndhurst, and which they contended was of higher authority than the conflicting decision of Sir J. Leach, M. R. in the subsequent case of *Hardwick v. Thurston*,^(b) *Calthorp v. Gough*,^(d) and *Chatteris v. Young*,^(e) were [*627] also referred to.

Mr. *Swanston* and Mr. *Chandless*, appeared for the respondents, but

THE LORD CHANCELLOR, without hearing them, said:—No-

(a) 3 Russ. 340.

(b) 4 Russ. 380.

(c) 3 B. C. C. 395, n.

(d) 6 Madd. 30 and 2 Russ. 183.

1848.—*Edwards v. Salloway*.

thing can be more clearly established than that legatees, described as the next of kin of another person, are of a description under which parties may take the benefit of a bequest, and the question here is, whether parties so described are to be deprived of what is expressly given to them by that description, simply upon a speculation that if the testator had foreseen the event which has happened, he would not have made such a disposition. Such a proposition is contrary to all principle. It is in vain to speculate on what a testator might or might not have done or intended in a different state of circumstances, from that which he in fact contemplated. That would be quite arbitrary and full of danger. The only safe way of determining what a testator intended, is to look at what he has said. It may be that in the present case the disposition in favor of the next of kin of the wife, was introduced only for the purpose which has been suggested, and that the testator would not have thought fit to provide for those individuals if he had foreseen that his wife would not live to take the benefit of his bequest to herself; but whatever may have been the motive for the gift, the gift and the motives for the gift are different things, and the gift itself is there. And even with reference to the motive, it may be observed that the gift to the next of kin was not necessary to the purpose of protecting the interest of his wife, for by giving her a general power [*628] of appointment in addition to a life interest, he had given her the absolute control over the fund. The gift to her next of kin in default of appointment, stands therefore as a distinct substantive disposition in the will, and I can find no principle for taking that gift away upon a speculation of what the testator might have done under different circumstances.

The conflict of the authorities which have been cited, enables me to dispose of the case as I should have done in the absence of any authority, and in that conflict I have no hesitation in preferring the later decision to the earlier one. But in such a state of the authorities, I cannot say that a party coming in a representative character was wrong in appealing to this court. I shall therefore dismiss the appeal without costs, and the costs of both hearings will be costs in the cause.

1848.—*Moss v. Buckley.*

MOSS v. BUCKLEY.

1848: June 16.

Leave given to serve a traversing note on a defendant for whom the plaintiff had entered an appearance, though the case was not within the 56th Order of May 1845, which authorizes such service only on a defendant who defends either in person or by a solicitor.

ONE of the defendants having failed to appear, the plaintiff entered an appearance for him under the 8th Order of August 1841, and after waiting six weeks for an answer, filed a traversing note, and applied to Vice-Chancellor Knight Bruce for an order to serve it on the defendant; but his Honor declined to make the order, in consequence of the observation attributed to the Lord Chancellor in *Anon.* 11 Jurist, 28, that the 56th *Order of May 1845 applied only to cases in which the [629] defendant either defended by a solicitor or in person, whereas in the present case the defendant was not within either of those classes, not having as yet taken any step whatever in the cause.

Mr. *Smythe* now renewed the application before the Lord Chancellor, contending that the case, although not within the letter of the order, was within the spirit of it; and that here there was not the same difficulty which existed in the case cited, as the defendant there was in America, and the court had no jurisdiction to order service abroad, except under the act of parliament,^(a) which went only to the subpoena to appear and answer.

THE LORD CHANCELLOR.—The present seems to be a *casus omisus* in the Orders. It is part of the 56th Order that service of the traversing note should be according to the 19th and 21st Orders of October 1842; but when you go to them, they do not apply to your case. You want, therefore, an order independent of the General Order. I think it is within my jurisdiction to make a distinct order for this particular purpose. Therefore I make an order now for service of the traversing note on the defendant personally.

(a) 4 & 5 W. 4 c. 82.

1848.—In re Walker.

[*630]

*Re WALKER, a Lunatic.

1848: July 8.

The committee of the estate of a lunatic is not entitled to any remuneration for his trouble. Where any allowance is made to him, it is not for his sake, but for the benefit of the estate, as where rents cannot be effectually collected by the committee without assistance.

MR. WALPOLE applied upon the petition of the next of kin of the lunatic, for a reference to the Master to appoint a receiver, at a proper salary, of the rents of the lunatic's real estate, which consisted of a great number of tenements in Yorkshire, let at very small annual rents, which were stated to be very troublesome in the collection; and that a Mr. Rawson, a relative of the lunatic, who had been appointed committee of the estate in July 1847, might be at liberty to propose himself.

THE LORD CHANCELLOR.—As the committee has accepted the office without any stipulation for the appointment of a receiver, or for remuneration to himself for extraordinary trouble, I will not make any order of reference, unless on the understanding that he absolutely refuses to continue on the present terms. If he does so refuse, I will refer it to the Master to inquire whether it will be fit and proper and for the benefit of the lunatic's estate, that any and what allowance should be made to the committee for collecting the rents. The amount will then be entirely in the Master's discretion, and if Mr. Rawson refuses to accept the sum which the Master thinks fit to allow, some one else must be appointed committee in his place.

The order was made accordingly.

See the next case.

[*631]

*Re WESTBROOKE.

1848: July 12.

Allowance not exceeding 5 per cent on receipts, to committee of lunatic's estate for expenses out of pocket in collecting rents.

 1847.—*In re Westbrook.*

A SIMILAR application to the last was made in this case by Mr. Miller, who stated that the lunatic's estate consisted of twenty-seven tenements, yielding an aggregate rent of £1300, but scattered about in various districts in the neighborhood of London; and that the committee, who had been appointed about a year ago, had accepted the office at the request of the mother and sister of the lunatic, in the belief that he should be allowed a remuneration for the trouble of collecting the rents, which occupied a great deal of time.

THE LORD CHANCELLOR.—The public ought to know that committees are not entitled to any remuneration, and as this committee accepted the office with knowledge of what the property was, and without stipulating for any allowance, I shall certainly not allow it in his case: but as the estate may require some aid in its management, for the sake of the property, not of the committee, I shall direct the Master to allow him the expenses of collecting, meaning thereby money actually expended, not exceeding 5 per cent. on his receipts.

*MOTT v. BLACKWALL RAILWAY COMPANY. [632]

1848: July 8.

The question in the cause being, whether the plaintiff was entitled, under an agreement for a building lease, to a covenant for the use of a certain road, which he claimed, first, by contract as implied by the delineation of a plan in the margin of the agreement, and, secondly, on the ground of acquiescence, the court directed an action to try the alleged legal right, first, reserving the question of acquiescence as a purely equitable one, and material only in case the legal right should be determined against the plaintiff.

The court will direct the defendant in equity to be plaintiff in such action, if by that means the right can be more conveniently tried.

THE plaintiff had built a house under an agreement for a building lease from the then owner of the soil, who shortly afterwards sold the land adjacent to it on one side to the defendants, for the purpose of their railway. In the margin of the agreement was delineated a plan of the demised premises, representing them as bounded at the front by a high road, which

1847.—*Mott v. Blackwall Railway Co.*

was actually made; and on the side towards the railway, by another intended road, to be called *Arnold Road*, which, though not actually made, was marked out by removal of the turf; and this plan the plaintiff relied on as entitling him to lease with a covenant for the use of the road so marked out, although the agreement did not in terms provide for such covenant. The defendants denied that right, and were proceeding to build a station upon the line of the road in such a manner as to render it impassable. The bill was filed to restrain them from so doing, and for the execution of a lease by the company in conformity with the plaintiff's construction of the agreement, charging that if the agreement itself did not entitle him to the right of road which he claimed, his lessor had, previously to the sale to the company, knowingly permitted him to act upon the agreement in such a manner as to preclude the lessor, and the company as claiming under him, from disputing that right.

[*633] *On a motion for the injunction, before Vice-Chancellor Wigram, his Honor directed that the plaintiff should tender to the defendants a lease containing such covenant as he claimed, and that, on the defendants refusing to execute it, the plaintiff should bring an action against them for breach of the agreement, the defendants admitting, for the purpose of such action, that they had stopped up the road: the motion, in the mean time, to stand over.

On an appeal from that order by the plaintiff, it was contended, on the part of the appellant, that the case was one for the decision of this court, and not of a court of law, as it was for a court of equity to say how an agreement ought to be carried into effect; that the action directed by the Vice-Chancellor would decide nothing as to the effect of the acquiescence, on which the plaintiff chiefly relied; and that it would not necessarily decide even the other point, inasmuch as the lease to be tendered might unintentionally vary from the agreement in some minute particular, independent of the covenant in question, which, although, the plaintiff might not care to insist upon it, would, nevertheless be a good defence to the action.

THE LORD CHANCELLOR.—If that be the only difficulty, let

 1847.—*Mott v. Blackwall Railway Co.*

the defendants bring the action against the plaintiff for not accepting a lease *without* the covenant. Such an action would determine the rights of the parties under the agreement, which are the same at law as in equity. That will leave open the other question, which is a purely equitable one, whether the conduct of the defendants, or those under whom they claim, has been such as to preclude them from *insisting [*634] on their legal right, if they shall turn out to have it.(a)

Notwithstanding this observation the argument was continued, and both sides relied on *Harding v. Wilson*.(b)

On the conclusion of the argument,

THE LORD CHANCELLOR varied the order in conformity with the above suggestion, and, having ascertained that a delay in building the station would not produce any serious inconvenience to the railway works, he granted an injunction in the mean time.

The *Solicitor-General*, Mr. *Butt*, and Mr. *Southgate*, appeared for the plaintiff.

Mr. *Wood*, and Mr. *Bigge*, for the defendant.

 *WARE v. ROWLAND.

[*635]

1847: Nov. 13, 15; 1848: Jan 29.

A testator directed his executors to set apart a sum of stock to answer an annuity of 600*l.* to be paid to his daughter Anna Maria (who was then his only surviving child) for her life, and on her death to divide the principal among her children, if she should leave any, on their respectively attaining the age of twenty-four; if no child, or none who should attain that age, to pay thereout two small legacies, "and all the rest and residue of the said principal fund he gave and bequeathed to and amongst his heirs-at-law, share and share alike;" and in a subsequent part of his will he appointed his said daughter by name his general residuary legatee. Held, nevertheless, that as sole heirs-at-law and next of kin of the testator at the time of his death; she, and not his heir-at-law or next of kin at the time of her death, was entitled, under the ultimate gift, to the fund set apart to answer the annuity.

 (a) See *Barnard v. Wallis*, Cr. & Ph. 85,

(b) 2 B. & C. 96.

1847.—Ware v. Rowland.

PHILIP SLATER, by his will dated the 19th of July 1806, directed his executors to purchase, in the 3 per cent. reduced annuities, the sum of 600*l.* a year, upon trust to permit his wife to receive the said annuity for her life, and after her death in trust for his daughter Anna Maria Slater; and after her death, to distribute the principal amongst the children of his said daughter, at their respective ages of twenty-four years, with maintenance in the meantime; after which the will proceeded as follows:—
“If at the death of my said daughter she should leave no child or children living, or in the event of such child or children dying under twenty-four, then I direct my trustees to sell the said principal fund, and to pay thereout to my son-in-law J. G. Christian, and my grandson G. T. Rowland 500*l.* each, if they should severally be alive at that time; and all the rest and residue of the said principal fund, with the interest and dividends, I give and bequeath to and amongst my heirs-at-law, share and share alike.” In a subsequent passage of the will the testator gave the residue of his property to his daughter Anna Maria Slater by name.

Anna Maria Slater was the only surviving child of the [*636] testator at the date of his will, and she was also his sole heiress-at-law, and next of kin at the time of his death. Upon her death, in the year 1844, without having married, the heirs-at-law of the testator were Philip Slater Fall and Isaac Hedgson Wilson, two of his great-nephews, grand-children of his two sisters; and his next of kin at the same time was Jemima Brune, a daughter of one of those sisters.

On the death of Anna Maria Slater, the principal fund set apart to answer the annuities, consisting of about 20,000*l.* stock, was contested between three parties, the personal representative of Anna Maria, as the sole heiress-at-law and next of kin of the testator at the time of his death; Fall and Wilson, as his co-heirs-at-law at the death of Anna Maria; and Jemima Brune, as his sole next of kin at the same period.

The Vice-Chancellor of England having decided in favor of the first, the other two parties presented separate appeals, which came on to be argued together.

1847.—Ware v. Rowland.

Mr. *Humphrey* and Mr. *Bates*, for *Jemima Brune*.

Mr. *Rolt* and Mr. *Bazalgette*, for *Fall and Wilson*.

Mr. *Bethell*, Mr. *Js. Parker*, and Mr. *Hetherington*, in support of the decree.

Jan. 29, 1848.—THE LORD CHANCELLOR.—If *Holloway v. Holloway*,^(a) lays down the rule correctly, there can be no doubt of its governing this case. In that case, as in this, the testator had a daughter, to whom he gave the interest, for life, of a sum of money *which he directed should be taken [*637] out of his general estate and invested. In that case, as in this, after the daughter's death, her children, if any should be living at the time of her death, were to have the fund, and if she left no children, part of the fund in *Holloway v. Holloway* was to be held in trust for the personal representative of the daughter; and the remainder of the fund in trust for such person or persons as should be the testator's heir or heirs-at-law. In the present case, in the event of the daughter not leaving children the trustees were then, that is in that event, to sell the trust-monies, and to pay thereout to two other persons a certain part, if they should be severally living at that time; and then follow these words: "All the rest and residue of the said principal trust-monies, with the interest, increase, and dividends, I give and bequeath to and amongst my heirs-at-law, share and share alike;" and in a subsequent part of his will, he gave all the residue of his property to his daughter by name.

In both cases the word "then" is to be found; but in both it refers to the event and not to the time. In *Holloway v. Holloway*, the part of the fund to be separated from the rest was, in the event of the daughter not leaving children, to be her's absolutely; and the gift to the heirs is of the remainder of the fund; whereas, in the present case, if the persons to whom part of the fund was given did not survive the daughter, the gift to them was not to take effect; in which case, therefore, such part continued

(a) 5 Ves. 399.

 1847.—Ware v. Rowland.

a constituent part of the fund, and would pass with it to the heirs. In *Holloway v. Holloway* the trust for the heirs is, "for such person or persons as shall be my heir or heirs-at-law," there being, at the testator's death, three daughters his co-heirs-at law and next of kin; and the word "shall" seemed to describe persons who should be found to the heirs at a future [638] "time. In this case, there being but one heir and next of kin, the testator gives "to his heirs-at-law share and share alike." He uses the plural, although there was but one: in *Holloway v. Holloway* he uses the singular, although there were three heirs. In *Holloway v. Holloway* the testator describes the duty of the trustees to arise upon the death of the daughter without issue. In the present case, after prescribing their duty as to the portion of the fund to be separated and paid to other persons, he makes a new and distinct gift to the heirs: "All the rest and residue of the said trust-moneys I give and bequeath amongst my heirs-at-law, share and share alike." Having in view a provision for certain persons not to be permanent except in particular events, he no longer declares any trust of the fund so appropriated, but, in effect, lets it fall into the residue of his estate by giving the fund subject to such prior gift to "his heirs," who, being his daughter, was his general residuary legatee.

In all the particulars in which the two cases differ, the differences are in favor of the claim of the future heir in *Holloway v. Holloway*; but Lord Alvanley, acting upon the authority of many earlier cases, held that the heirs at the death were the parties described. Such, he said, was the intendment of the law, and such must be understood to be the meaning of the words, unless by the context or express words they plainly appear to be intended otherwise, of which he did not find sufficient proof in that will. But if Lord Alvanley could not find such proof in that case, I certainly cannot find it in this, thinking, as I do, that there was much more of evidence tending to that proof in that case than there is in this. There is, indeed, nothing of such tendency in this case, except the description of heir in the plural. I have already observed, that there was [639] a similar inadaptation of the expressions used to the

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state of the family in *Holloway v. Holloway*; but in the present case there is, I think, a very obvious solution of the apparent inconsistencies.

Suppose a testator, after making all such provisions as he was anxious about, finds that in certain events all these provisions might fail, and having no other object in view, might naturally wish that the law, with respect to the disposition of his property, should take its course. If he so expressed his wish, his heir or next of kin would take in the event of the provisions failing; but as that might not take place until some distant period, it would be uncertain who would, at such time, stand in the place of such heirs; and the testator might therefore very naturally express such wish in the terms used in this will; and it is not at all inconsistent with such an expression as to a future and contingent interest, that he should give the residue of his property, being a direct gift, to his daughter by name; or he might have contemplated the possibility of his daughter's death in his own lifetime.

Since *Holloway v. Holloway* several cases have occurred, and particularly *Jones v. Colbeck*,^(a) and *Miller v. Eaton*,^(b) which, it might have been supposed, would have received a decision different from that which Sir W. Grant pronounced upon the authority of *Holloway v. Holloway*; but in none of those cases do I find any disapprobation expressed at that decision, or any intention entertained of overruling it; but in all, distinctions are taken, which, whether tenable or not, leave that authority untouched: yet in none of these is the claim of the heir at the death supported by circumstances so strong as are to be found in the present case.

*There is, I think, no ground for the claim of the heir [*640] or next of kin to the exclusion of the daughter; and she filling the characters both of heir and next of kin, no question arises as to whether she took the fund in the one character or in the other; I therefore think the decree right, and that the appeals must be dismissed with costs.

(a) 8 Ves. 38.

(b) Sir Geo. Cooper, 372.

 1846.—Kirk v. The Guardians of the Bromley Union.

**KIRK v. THE GUARDIANS OF THE POOR OF THE BROMLEY
UNION.**

1846 : Dec. 11, 14. 1848 : Jan. 27.

A builder agreed, by a written contract under seal, with a board of guardians, to build a workhouse according to a certain plan for a certain sum : and any deviations from the plan, which the board or their architect might order in the course of the work, were to be valued in a particular manner, and the value added to or deducted from the stipulated price, as the case might be ; but it was expressly provided that no allowance was to be made to the builder for additional work, unless the same should be ordered in writing. After the builder had been paid for all the work done pursuant to the written agreement, he filed a bill against the board, alleging that much additional work had been done with the knowledge and sanction of the board, and on the faith of an assurance from their agent that no written order for it was necessary, and praying an account and payment of what was due in respect of such work. On a general demurrer to the bill, Held, first, that the subject-matter of the claim was not of itself within the jurisdiction of this court ; and, secondly, that the alleged fraud on the part of the board, in taking advantage of the want of a written order to avoid paying for work which they had sanctioned, would not give the court jurisdiction, and that bills to enforce parol contracts within the Statute of Frauds, on the ground of part performance were different, the court having jurisdiction in those cases over the original subject-matter, viz. the contract, and the question being whether that jurisdiction was ousted by the want of a writing, whereas here the attempt was to make the want of a writing the ground of jurisdiction.

THIS was an appeal from an order of the Vice-Chancellor of England, overruling a general demurrer to the bill for want of equity.

The bill stated that on the 24th of May, 1844, the plaintiff, who was a builder entered into an agreement in writing with the defendants to build a workhouse for the Union, according to a specification thereto annexed, and to certain drawings prepared by Messrs. *Savage and Foden, architects, for the sum of 5575*l.* ; the works to be begun, proceeded with, and completed under their directions, and under the inspection of a clerk of the works to be by them appointed ; and it was thereby amongst other things provided, that it should be in the power of the board of guardians, or of the architects by their authority, to direct such alterations to be made in the works during their progress as they should deem expedient, which alterations should

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not vacate or make void the contract, but should be performed by the contractor, according to the directions he should receive; and the value of the same, whether in addition or deduction, was to be ascertained by the architects, and to be added to or deducted from the amount of the contract accordingly; but no allowance was to be made to the plaintiff for extra or additional work, unless the same should have been ordered in writing; and it was further agreed, that the decision of the said Mr. Savage with respect to the amount, state and condition of the work actually done, and also in respect of any question that might arise concerning the construction of the agreement, or the specification or drawings, or the execution of the works thereby contracted for, should be final and conclusive.

The bill then stated that the agreement had been duly sealed with the corporate seal, and delivered to the plaintiff; that he commenced the work, and duly completed it as after mentioned; but that in the very outset it had been found necessary to make considerable deviations from the ground plan to which he had been referred on executing the contract, in consequence of the levels having been incorrectly taken, and that a great deal of additional work was occasioned by such deviation, the whole of which, however, was ordered by *and executed [*642] under the inspection of the architects and the clerk of the works.

The bill then stated, that on receiving the order for such deviations, the plaintiff's foreman had asked the clerk of the works for a written authority from the architects, but that the clerk of the works had answered, that no written order was necessary, and that the verbal order he had given would be valid. That relying on that assurance, and inferring from the conduct of the defendants, that the stipulation requiring a written order for deviations had been waived, the plaintiff executed the additional work according to the directions of the clerk of the works, and under the sanction and with the knowledge of the architects; and that several members of the board, in particular seven who were named, frequently visited the works during their progress, and having remarked upon the deviations from the original plans, and being informed of the necessity for them, expressed their

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approbation thereof; but that on a claim for reasonable remuneration in respect of such additional works being sent in, such claim had been disallowed on the ground that they had been done without any written order. That in other instances, work, after having been executed according to the original plan, had been removed and re-executed according to some new design, by the express direction of the clerk of the works as the agent of the defendants, but that compensation for such alterations had on a similar ground been refused. That the items so disallowed amounted in the whole to 1594*l.* the whole of which the defendants refused to pay.

[The bill then charged that the plaintiff had very seldom any personal communications with the defendants; and that [*643] all the orders came to him through the "clerk of the works who was appointed by them, and acted throughout as their agent, and that the plaintiff always considered, and was, in fact, induced by the conduct of the defendants, and their acquiescence in the deviations from the original plans which were from time to time made by the direction of the architects or the clerk of the works, to consider that all such orders were given to him with the cognizance and by the direction of the defendants.

The bill further charged, that the architects and the clerk of the works were in the habit of attending the board meetings of the guardians, and of reporting to the board the progress of the building; and that on such occasions, they laid before the defendants the plans of, and acquainted them with any deviations from, or additions to, the original plan of the building, which the architects found or considered either necessary or expedient; and that such deviations or additions were discussed at such times by the defendants, and the nature and expense of them considered, and the architects were then authorized by the defendants to order such deviations from, and additions to, the original plan as the defendants approved of; and that all the deviations from and additions to the original plan, for which the plaintiff had charged as additional work, were so sanctioned or approved and authorized by the defendants, and that minutes of such approval were entered in the minute books of the board, and signed by the chair-

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man present at the meetings of the board at which such matters were discussed.]

The bill also charged that the minute books, and entries therein of the orders for the deviations and alterations which were from time to time made by the plaintiff did "in fact [*644] form the necessary written authority for such deviations and alterations.

[The bill then charged that throughout the progress of the building, the architects acted by the authority and with the cognizance and consent of the defendants in the orders which they gave to the plaintiff for the execution of additional work; and that the defendant always encouraged the plaintiff to believe, and, in fact, gave him to understand, that all the additional work performed by him under the direction of the architects was ordered with their cognizance and by their authority, and would be paid for by them.]

The bill prayed, that it might be declared that the defendants had waived, or were not under the circumstances aforesaid entitled to insist upon, the necessity of any order or orders in writing other than as before mentioned, previous to the execution of the aforesaid works; and that they might be decreed specifically to perform their contract with the plaintiff, and to pay to him the balance of 1594*l* remaining due to him upon the said contract; or that an account might be taken of the works executed by the plaintiff by the order of the defendants, and that the plaintiff might have credit in such account for the items which had been so disallowed as aforesaid on the ground that no written orders had been given for the works to which they referred, and that the defendants might be decreed to pay to the plaintiff what, on taking such account, should be found due to him.

Mr. *Stuart*, Mr. *Rolt*, and Mr. *Hargrave* for the appellant, in support of the demurrer, contended that, independently of any special circumstances, the plaintiff's claim, being a mere *quantum meruit* for work and "labor done, was not a fit [*645] subject for a bill in equity; *Ambrose v. Dunmow Union* ;(a) and that what the plaintiff called acquiescence, sanction,

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or encouragement on the part of the board, as supplying the place of a written order for the work, was available to prove an implied contract at law (*Sanders v. Guardians of St. Neol's Union*;(a)) and therefore afforded no ground for coming into this court.

Mr. *Bethell* and Mr. *Hetherington*, for the bill, contended that the work in question was not work for which a corporation would be liable upon an implied contract; *Paine v. Guardians of the Strand Union*;(b) but even supposing it was, and that an action on an implied contract would lie for it, that would not meet the plaintiff's case; for what he claimed was not payment on the footing of *quantum meruit*, but on the footing of the express contract which had been entered into, but which, it was clear, he could not enforce at law for want of a written certificate: for at law there could be no parol waiver of any part of a contract under seal. The case was, therefore, of that class in which this court was in the habit of giving relief against parties who sought to take advantage of some legal right, or ground of exemption, against conscience. Such were cases of relief beyond the penalty of a bond (*East India Company v. Champion*;(c)) or against forfeitures or other penalties for breach of certain covenants; or of relief upon part performed contracts within the Statute of Frauds, which came the closest to this case, the principle of them being, that it was against conscience to take advantage of the want of a writing. In *Bond v. Hopkins*;(d) Lord Redesdale said, "One acknowledged principle on which courts of equity give relief is to prevent an advantage gained at law from being used against conscience. There are two modes by which the court gives relief in such cases; one direct, the other indirect. In the first mode it acts by giving of itself full relief; in the second, by enabling the party to try his title at law without the impediments which may, against conscience, be opposed to his proceedings." In the present case the first mode was inapplicable, for if this court were to attempt to restrain the defendants by injunction from setting up the want of a written cer-

(a) 10 Jurist, 566.

(b) 10 Jurist, 308.

(c) 1 Sch. & Lef. 430.

(d) 11 Bligh, 158. See p. 187.

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tificate as a defence, the court of law would not regard it. The plaintiff, therefore, was right in resorting to the second mode, and in asking this court to decree payment at once.

On the conclusion of the argument,

THE LORD CHANCELLOR said he should look into the bill and the cases which had been cited, before he gave judgment; but that there was this distinction between the present case and those of specific performance, that there, the question was whether the jurisdiction was taken away by the want of a writing—here whether it was given.

Jan. 27, 1848.—THE LORD CHANCELLOR.—The effect of the relief prayed by the bill is that the plaintiff may recover in this court the sum claimed by him as the balance of his charge for building the Bromley Union House, which charge includes as well the work specified in the contract as other not so specified, but alleged to have been subsequently ordered, although no order in writing was given for such additional *works; [*647] and two questions appear to me to arise: 1st. Whether the case stated in the bill entitles the plaintiff to charge those additional works without any order in writing: and 2nd, if so whether the plaintiff has shown a right to appeal to the jurisdiction of this court to enforce payment of what he so claims.

The contract, after referring to certain plans, drawings, and specifications of the intended buildings, was merely an undertaking by the plaintiff to do such works for a specified sum and by the defendants to pay such sum; but it contained this provision: "It is also to be in the power of the board of guardians to direct such alterations to be made in the works during their progress as they may deem expedient, which alterations shall not vacate or make void the contract, but shall be performed by the contractor according to the directions he may receive; the value of the same, whether in addition or reduction, is to be ascertained by the said architects, and to be added to or deducted from the amount of the contract accordingly; but no allowance is to be made to the contractor for extra and additional work unless the same shall have been ordered in writing." The bill alleges that

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divers alterations and deviations became necessary and were made in the progress of the works ; and that, although no orders in writing were given, the defendants knew of and approved, and directed through their architects and clerk of the works, all such alterations and deviations, and afterwards sanctioned them. The passages selected by the Vice-Chancellor in his judgment^(a) are, I believe, the strongest in the bill ; and they certainly do not put the case higher than I have stated.

[*648] "That this court will not in general assume jurisdiction over such a contract, is clear. The recent decision of the Master of the Rolls in *Ambrose v. Dunmow Union*^(b) is, I believe, the latest authority, and distinctly proceeds upon that principle. So the question is really reduced to this : Does the statement in the bill as to these extra works and deviations give the court a jurisdiction which, without such special facts, it would not have had ? The Vice-Chancellor put his decision upon a well known rule, that, notwithstanding an express stipulation in a contract, the parties may, by their conduct, waive it ; and that in this particular case the provision, that the defendants were not to be bound by any order for an alteration or deviation unless in writing, did not prevent the plaintiff from enforcing payment in this court of the amount and value of such alteration and deviation, inasmuch as the defendants had by their conduct induced him to believe that he would be paid for the same, and would, therefore, be guilty of a fraud in withholding payment.[1]

(a) These passages are, in the above statement, included within crotchets.

(b) 9 Beav. 508.

[1] That written order may be waived, see *Smith v. Gugerty*, 4 Barbour's Sup. Ct. R. 614. The contract contained a provision that the party for whom the building was to be erected, should pay and allow to the person contracting, a fair valued price for any workmanship or materials that he should order to be done by a written memorandum from him to the contractor. Numerous alterations were made from the original plan, and specifications by the verbal directions of the owner of the building, but the work was not done under any written memorandum to the builder. The plaintiff sought to elude payment for the extra work and materials, on the ground that there was no writing authorizing the extra work as required by the contract. In answer to this objection, Strong, Justice, said : " It is true that there is no positive evidence of the existence of such writing, and as, if there had been any, it would probably have been delivered to Gugerty, (the builder,) it is fair to presume that there was none. The provisions requiring such writing being favorable to Smith, (the owner.)

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This result would follow from any case in which a party could not recover his debt at law for want of writing; but that cannot be contended: for the mere inability to enforce a legal debt at law does not give the party a remedy in equity.

The case was compared to bills for specific performance of parol contracts; but in that case the court has jurisdiction in the original subject matter, *i. e.* the contract; and the question is, whether the want of writing shall deprive the court of it. Here, the attempt is to make the want of writing the ground of jurisdiction; but, if this principle be sound, why may not all parol contracts, which the Statute of Frauds requires should be in writing, be enforced in equity, where the plaintiff [*649] has acted upon the faith of the contract with the knowledge of the defendant? The question between the parties is, does the provision in the contract protect the defendants against the performance of these parol contracts? The bill assumes that it does, by praying that the defendants may not be permitted to set up the objection.

In the view I take of this case it is not material, but I cannot but observe, that the acts charged of knowledge, approval, and acquiescence on the part of some of the guardians cannot affect the right of the guardians as a body, in which character they are sued. I think the overruling the demurrer upon the ground stated would open a new head of equity, which cannot be supported; and consequently that the demurrer ought to have been allowed.

could be waived by him if he chose to do so. It is not necessary that the waiver should be in writing in order that it should be effectual. (*Fleming v. Gilbert* 3 John R. 528; *The Mayor &c. of N. Y. v. Butler*, 1 Barb. Sup. Ct. R. 338.) Here the evidence is sufficient to prove such a waiver by Smith. He not only gave verbal directions for the performance of the extra work, but when Gugerty objected that the agreement between them required a written order for that purpose, and said that he had done enough without a written agreement, and should do no more, Smith called a witness, and in his presence and in the presence of the architect said: "Whatever extra work you do for me I will pay you for it." And the architect said: "Mr. Gugerty, that is as good as a written order to you, and I will see it right to you." It appears, too, that some of the extra work was done by orders given by Smith and his architect directly to Gugerty's workmen; and it is inferible from the evidence without any directions from him. The inference is clear from all this, that the parties mutually waived the provision requiring a written memorandum for extra work or omitted work.

1848.—Heath v. Chadwick.

HEATH v. CHADWICK.

1848; July 12.

Creditors of an insolvent cannot maintain a suit respecting property or rights alleged to have belonged to the insolvent, and to be vested in his assignee under the Insolvent Debtors' Acts, upon an allegation of collusion between the assignee and the party against whom the relief is prayed; and the same rule applies to suits for a similar object by the insolvent himself.

THIS was an appeal from an order of the Vice-Chancellor of England overruling a general demurrer to the bill. The material substance of the bill, which was very voluminous, is stated in the Lord-Chancellor's judgment.

On the hearing of the appeal,

Mr. *Stuart* and Mr. *Rogers* appeared in support of the demurrers.

[*650] *Mr. *Bethell* and Mr. *Lloyd* for the bill.

THE LORD CHANCELLOR.—The bill is filed by Heath on behalf of himself, and all other the creditors of Jacob Connop, an insolvent, under the Insolvent Debtors' Acts, except some who are made defendants, and of whom Lawrence is stated to be assignee under those acts.

The bill alleges divers incumbrances effected by the insolvent to several of the defendants which it impeaches for usury, and alleging a sale of the insolvent's leasehold property by the assignee, under which George Pearson, the defendant demurring, became a purchaser of part, states that the lease so purchased was afterwards surrendered to the lessor, and a new lease granted or agreed to be granted by him, and charging collusion between the assignee and the several defendants incumbrancers and purchasers, prays to redeem the incumbrances, notwithstanding the sale, surrender, and new lease, for the benefit of the creditors of the insolvent.

The bill does not allege or put in issue the fact of the plaintiff's debt, or state when the insolvency took place; but it does allege that at a meeting of the creditors, for the purpose of con-

sidering whether any suit in equity should be commenced for the purposes sought by this bill, or any measures adopted for the removal of the assignee, it was resolved that it would be inexpedient to take any proceedings for such objects.

The demurrer is for want of equity, multifariousness, and want of parties.

"The first objection, that the plaintiff, filing a bill on [*651] behalf of himself and all other creditors, does not put in issue the fact of his being a creditor, though fatal, is probably an accidental omission; but the other objections are of substance. It is a bill by one creditor, (supposing him to be a creditor) under the Insolvent Debtors' Acts, respecting part of the insolvent's estate; and that, after a resolution at a meeting of creditors, that no such proceedings should be adopted.

By the effect of the Insolvent Acts all property and rights of the insolvent are vested in the assignee. He is the person to realize the property, and to institute all proceedings proper for that purpose; but he is prohibited from instituting suits in equity without the authority of the creditors. It would be strange that any creditor should be competent to institute such suits which had not only not been authorized by, but had actually been prohibited by, the creditors. And this opens another objection. The bill alleges that the resolution against instituting any suit was carried out without any creditor voting against it; and yet the bill professes to be on behalf of the plaintiff and all other the creditors except the defendants.

The principal question, however, is, can creditors of an insolvent, under the Insolvent Debtors' Acts, maintain a suit respecting property or rights alleged to have belonged to the insolvent, and to be vested in his assignee, upon an allegation of collusion between the assignee and the party against whom relief is prayed?

The acts give ample power to the jurisdiction created by them to meet all such cases as are stated in the bill, particularly by the removal of the assignee, if he improperly uses or omits to use the authority vested in "him; and it is ob- [*652] vious that if individual creditors were permitted to file bills in this court, instead of resorting to the jurisdiction specially

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created for enforcing their rights and interests, the public would be deprived of much of the benefit of such special jurisdiction ; and much of the business which ought to be transacted there would be transferred to this court. I have, therefore, much satisfaction at finding that, in several recent cases, this subject has, as it appears to me, been upon a proper footing. In *Yewens v. Robinson*,^(a) the Vice-Chancellor of England decided against the right of creditors to file a bill upon these grounds, as he had before in *Kaye v. Fosbrooke*^(b) decided against the right of an insolvent debtor to file such a bill ; which was also the decision of Vice-Chancellor Wigram in *Major v. Auckland*.^(c) The point, indeed, has been long settled ; *Spragg v. Binkes* ;^(d) *Benfield v. Solomons* ;^(e) *Saxton v. Davis* ;^(g) *Hammond v. Atwood*.^(h) Some of these were cases in bankruptcy, but the principle is the same ; and all of them, excepting *Yewens v. Robinson*, were bills filed by insolvents or bankrupts, or persons claiming through them ; but, upon demurrer, the bill alleging a surplus, the equity of the bankrupts and insolvents cannot be distinguished from that of their creditors. *Barton v. Jayne*,⁽ⁱ⁾ and the case under appeal are the only decisions I am aware of, holding that such bills can be maintained.

I have referred to these cases, thinking it important that no doubts should exist as to the rule upon this subject, although it was scarcely necessary in a case in which the bill is open [*653] to so many objections. The *object of the bill is to redeem incumbrances, and to set aside sales, there being no privity between the plaintiff and the defendants, except that the proceeds of the property are distributable under the provisions of the Insolvent Debtors' Acts amongst the creditors of the insolvent.

Of the multifariousness and want of parties I need not say any thing : upon the former, the only question would be, whether matters totally distinct are so tied together by allegations in the bill as to preclude the objection upon demurrer. There is

(a) 11 Sim. 105.

(b) 8 Sim. 28.

(c) 3 Hare, 77.

(d) 5 Ves. 583.

(e) 9 Ves. 77.

(g) 18 Ves. 72.

(h) 3 Madd. 158.

(i) 7 Sim. 24.

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quite sufficient, without this, to compel me to allow the demurrer.

PIM v. WILSON.

1848: Aug. 8, 9.

Proceedings by a creditor under the 1 & 2 Vict. c. 110, s. 8, with a view to making the alleged debtor a bankrupt in default of his satisfying the demand, will not be interfered with in a court of equity on the ground merely of an allegation that such proceeding is dictated purely by fraud and malice, and that no debt is in fact due.

THIS was an appeal from an order of the Vice-Chancellor of England overruling a general demurrer to the bill.

The bill stated, in substance, that the plaintiff, who was an engineer, having, in the year 1825, given to the defendant Wilson, who resided in New Brunswick, an order for 100,000 railway sleepers, of a particular size and quality, a part of the quantity ordered was shipped early in the following year, and was duly delivered to the plaintiff, who had, in the meantime, accepted a bill for 336*l.*, drawn upon him against the cargo, which he afterwards paid: but that, finding that the sleepers varied both in size and quality from the order, so that they were wholly unsaleable in this country, he gave notice to Wilson, that he should take no more, and that he should [*654] hold him responsible for his breach of contract, to the extent of those which had been delivered. That notwithstanding that notice, Wilson, in the year 1847, sent word to the plaintiff, that the rest of the sleepers were made, and ready to be shipped, and that his drafts on him for the amount would be about 4000*l.* That the plaintiff having, in reply, expressed his surprise at the communication, and his intention to abide by the determination he had before announced, he heard nothing more upon the subject, until the month of June 1848, when Wilson caused him to be served with a copy of an affidavit, purporting to have been filed in the Court of Bankruptcy, stating that the plaintiff was indebted to him in the sum of 4357*l.* 18*s.* 10*d.*, for

1848.—Pim v. Wilson.

goods bargained and sold by him to the plaintiff, at his request, and for work and labor done for him, and that the plaintiff was a trader; accompanied by a notice requiring immediate payment of the same.(a)

The bill then charged that that proceeding, having for its object the issuing of a fiat in bankruptcy against the plaintiff in case the notice were not complied with, was, as the plaintiff verily believed, concocted and designed by and between Wilson his agent in this country, and his attorney (who made co-defendants with him,) not *bona fide*, for any purpose contemplated by the act of parliament under which they were taken, but fraudulently and with a view of extorting money from the plaintiff, which was not justly due, and of compelling him to go on with a contract, which, for the reasons before mentioned, he had justly repudiated; and that so far from the plaintiff being indebted to the defendant Wilson, he had a claim upon [*655] *him for damages, in respect of the sleepers which had been delivered and paid for.

The bill then charged that all this would appear, if the defendants would set forth the discovery thereby required; and after charging that the proceedings aforesaid were illegal and unjust, and that the defendants intended to follow them up, by causing a fiat in bankruptcy to be issued against the plaintiff, and that the issuing of such fiat would be of irreparable damage to the plaintiff and his credit, it prayed that the defendant Wilson and his agents might be restrained, by injunction, from taking or prosecuting any proceeding, or doing any act by means or in consequence whereof a fiat in bankruptcy might be issued against the plaintiff in respect of the alleged debt mentioned in the affidavit, and for general relief.

And Mr. *J. Parker* and Mr. *Hetherington* appeared for the appellant.

Mr. *Russell* and Mr. *Giffard* for the respondent.

The bill was attempted to be supported, first, on the allega-

(a) 1 & 2 Vict. c. 110, s. 8.

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tions of fraud—the case being compared to *Frewin v. Lewis*,^(a) and others of that class in which the court had interfered to prevent parties acting under the authority of acts of parliament, from exceeding or abusing their powers; and, secondly, on the irreparable damage which the credit of a trader might sustain by the mere issuing of a fiat in bankruptcy, before the legal remedy of annulling it could be applied. *Attwood v. Bankes*^(b) was also referred to as an authority for the jurisdiction.

*THE LORD CHANCELLOR, without hearing a reply, [*656] said, there was no more reason, but rather less, for interfering with the proceeding of which the plaintiff complained, than there was before the statute 1 & 2 Vict. c. 110, for interfering with the right of arrest on mesne process. The act had introduced no new hardship, but, on the contrary, a great benefit to the debtor, by substituting the present proceeding against his property for the former power of arrest of his person, by which he was liable to be thrown into prison, and thereby incapacitated for providing for the payment of his debts. If the proceeding sought to be restrained had been a mere action there could have been no doubt, the only equity suggested being, that no debt was in fact due. Yet, where was the difference between the two proceedings? both were remedies for the recovery of a debt, and in both the law must take its course in the absence of equitable grounds of interference. In *Attwood v. Bankes*, there was a clear equity: here there was nothing but the allegation of the debt not being due. The demurrer ought, therefore, to have been allowed.

(a) 4 M. & Cr. 249.

(b) 2 Beav. 192.

 1848.—*Lancashire v. Lancashire.*

[*657]

*LANCASHIRE v. LANCASHIRE.

1848: Feb. 16.

A devise of all the testator's property in trust for his niece, subject to a discretionary power in the trustees, on her attaining twenty-one or marrying, to settle the whole or such part as they should think fit upon her and her children if she should have any, with remainder, in default of children, to her mother absolutely. The niece attained twenty-one; but before any settlement was made under the power she died, without having been married. Held, that the power could not be then exercised, and that her heir was entitled to the whole of the real estate.

A trustee of a will who had formally renounced that character by a deed which purported (but ineffectually) to appoint a successor, being applied to eleven years afterwards to join with his original co-trustee in a deed purporting to be an exercise of a discretionary power which could only be exercised by the two trustees of the will for the time being, refused to do so, without an indemnity, but ultimately, on being indemnified, executed the deed. Held, that he could not resume his position as trustee for such a purpose, and that, even if he could, his execution of the deed under the circumstances stated, could be regarded only as a mere formal act, and not as an exercise of that discretion which was essential to a due execution of such a power.

If the nature of the case be such as to render costs a matter of discretion with the court, the mere circumstances that they form part of the relief specifically prayed by the bill does not make them a substantive matter of appeal from the decree.

WM. LANCASHIRE, by his will dated the 16th of May, 1830, devised and bequeathed all his real and personal estate to John Hutchinson and Ann Lancashire (the widow of his late brother, John Lancashire,) in trust to apply the whole or such parts as they should think proper, of the rents, interest, and income in the support, maintenance and education, of his niece, Sarah Lancashire, the only child of his said brother, until she should attain twenty-one, or marry with the consent of the said trustees of his will for the time being, and, immediately, on the happening of those events, in trust, to convey, assign, and settle the said trust estates and premises, and the accumulations thereof (if any,) or such part or parts of the same as they should think proper, to the use and for the benefit of his said niece and her assigns for her life, for her separate use, and after her decease to the use or for the benefit of all or such one or more of her children, in such manner and in all respects as she, whether covert or sole, should,

by deed or will to be executed in the presence of three
 [*658] witnesses, *direct or appoint; and in default of such

1848.—*Lancashire v. Lancashire.*

appointment and so far as any such, if made, should not extend to the use or for the benefit of all her children, as therein mentioned ; and if there should be no such child, then to the use or benefit of the said Ann Lancashire, her heirs, executors, administrators, and assigns absolutely. And as to such part or parts of the said trust estate and premises as his said trustees should not think proper to settle as aforesaid, and with respect to which he gave them absolute discretion, upon trust, to convey assign, and transfer the same unto his said niece, Sarah Lancashire, her heirs, executors, administrators, and assigns absolutely. And the testator directed that, to prevent dispute, such settlement should be submitted to and approved by some barrister of ten years' standing ; and he further willed and directed, that if the said John Hutchinson and John Lancashire, or either of them, or any other trustee or trustees to be appointed in their or either of their stead, as thereafter mentioned, or their respective heirs, executors, administrators, or assigns should depart this life, or decline to act in and for the trusts and purposes before mentioned, or any of them, then, and so often as it should so happen, it should be lawful for the then acting trustee or trustees of his will, with the consent of the person or persons for the time being beneficially entitled to the said trust premises, by any deed or instrument in writing duly executed, to appoint one or more person or persons to act in the room of the trustee or trustees so dying or declining to act as aforesaid : and that upon the appointment of any such new trustee or trustees, the said trust estate and premises should be vested in the new trustee or trustees jointly with the surviving or continuing trustee, or separately, as the case might require. And the testator appointed John Hutchinson and Ann Lancashire the executors of his will.

*The testator died in January 1831, and John Hutch- [*659]
inson and Ann Lancashire proved his will ; but by a
deed dated the 10th December 1831, and made between Ann
Lancashire of the first part, John Hutchinson of the second part,
and James Osborne of the third part, after reciting that Ann
Lancashire and John Hutchinson had proved the will, and un-
dertaken the execution thereof, and that John Hutchinson was
desirous of retiring from the trust, it was witnessed that, in ex-

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ercise of the power for that purpose contained in the will, Ann Lancashire, as continuing trustee under the said will, did thereby nominate and appoint James Osborne, her brother, joint trustee with herself, of the said will, in the place of the said John Hutchinson; but the deed contained no conveyance of assignment from John Hutchinson of his estate, as trustee, in the trust premises; and Sarah Lancashire, who was then a minor, was not a party to it.

Sarah Lancashire afterwards attained twenty-one, and was thereupon put in possession of the trust estates. She died, without having been married, in July 1842, up to which time no settlement of the trust estates had been executed pursuant to the power in the will: but by a deed dated the 1st of November 1842, and made between Ann Lancashire and James Osborne of the first part, John Hutchinson of the second part, William Cantrell and Joseph Osborne of the third part, and the said Ann Lancashire of the fourth part, after reciting the facts above stated, and also that doubts might be entertained whether John Hutchinson was discharged from the trusts of the will of William Lancashire by the indenture of the 10th of December 1831, and that in order to obviate such doubts John Hutchinson had concurred with

Ann Lancashire and James Osborne in the propriety of [*660] the settlement *proposed to be made, and that Ann Lancashire, James Osborne, and John Hutchinson respectively, in execution of the trusts of the said will, had agreed and determined to make and execute the settlement thereafter contained, which had been submitted to and duly approved by Mr. Cantrell, who was a barrister of ten years' standing—Ann Lancashire, James Osborne, and John Hutchinson conveyed and assigned all the real and personal estate devised and bequeathed by the will of William Lancashire, to the said Joseph Osborne and William Cantrell, their heirs, executors, &c., to the use and for the benefit of Ann Lancashire, her heirs, executors, &c. for ever.

John Hutchinson, on being applied to by Ann Lancashire to execute that deed, declined to do so without an indemnity, having never interfered in the trusts since his retirement therefrom in 1831. In consequence of that refusal Ann Lancashire and

her solicitor gave him their joint and several bond of indemnity, whereupon he did execute the deed on the 16th of December 1842.

Under these circumstances the present suit was instituted by the heir-at-law of Sarah Lancashire, claiming the real estate devised by the will of William Lancashire, on the ground, first, that the discretionary power thereby given to the trustees to make a settlement of the property, not having been exercised during the life of Sarah, had upon her death ceased to exist: and, secondly, that if it did continue after her death it had not been validly executed by the deed of 1842, inasmuch as Osborne was not duly appointed a trustee by the deed of 1831, for want of the concurrence of the party beneficially interested: and that Hutchinson having then retired from the trust, was incompetent to resume "his place after an interval of [*661] eleven years, for the purpose of exercising the power.

The cause was heard before Vice-Chancellor Knight Bruce, who made a decree for the plaintiff with costs, expressing in his judgment(a) a doubt, but no opinion, as to whether, independently of the bond of indemnity and in the absence of all unfairness, and of all circumstances of a suspicious nature, Hutchinson could, after his retirement and the ineffectual appointment of a successor, have returned effectually, after the lapse of so many years, to the trusteeship for any purpose.

An appeal by Ann Lancashire from that decree now came on to be heard.

Mr. *Bethell*, Mr. *Wigram*, and Mr. *Webster* appeared for the plaintiff.

Mr. *Rolt*, Mr. *Bacon*, and Mr. *Bazalgette* for the appellant.

Sir *Francis Simpkinson* for Hutchinson.

Upon the point above mentioned as left undecided by the Vice-Chancellor, no authority was cited.

(a) 1 De Gex & Sm. 238. See p. 296.

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In the course of the argument,

Mr. *Bazalgette* contended that the decree ought at all events to be varied as to the costs, although it should be affirmed in other respects, insisting that where costs were part of the relief specifically prayed by the bill, they became a substantive matter of appeal, *Jenour v. Jenour* ;(a) but

[*662] *THE LORD CHANCELLOR said he could not recognize that principle ; if he did, the consequence would be, that every bill would pray expressly for costs, in order to enable the plaintiff to raise that question on appeal. That if the nature of the case was such as to render costs a matter of discretion with the court, it could make no difference whether they were or were not expressly prayed by the bill.

At the conclusion of the argument,

THE LORD CHANCELLOR, after expressing a clear opinion that the direction in the will as to a settlement, did not, as had been contended on the part of the appellant, constitute an imperative trust, but merely a discretionary power, proceeded to the following effect : There being, therefore, nothing on the face of the will to give Mrs. Lancashire any estate, except through the intervention of the power, the only question is, has the power been executed ? Now the construction of instruments of this kind must depend, in some degree, upon the circumstances and situation of the parties ; but I think it is clear that in this case the power was introduced for the benefit and protection of the niece, and not for the benefit of any other person. The testator intended his niece to have the enjoyment of the property ; but he foresaw that circumstances might arise, either on her attaining twenty-one or marrying, in which it would be more secure and more for her benefit not to give her the absolute disposal of the property in fee simple, and therefore he says to the trustees, I give this property to my niece if you do not interfere ; but you may interpose your authority either as to the whole or as to any part, and in-

(a) 10 Ves. 562.

1848.—*Lancashire v. Lancashire*.

stead of handing over the property to her absolutely, which you are authorized to do you *may settle it—either the [*663] whole or a part—by giving her an estate for life, with remainder after her death to her children, and in the event of her not having children, then to her mother. To be sure the niece could not have come, at any period of her life, and say, “Hand me over this property;” because whatever age she might attain the possibility of her marriage would continue up to the time of her death. But suppose there had been no mention of marriage in the will, and that the trustees had permitted her to remain in the uncontrolled enjoyment of the property for fifty years after she attained twenty-one, could the court have allowed them to keep the property from her, or to deprive her devisee of it, if she had disposed of it by will? I apprehend not: because the plain intention of the testator would have been that their discretion should be exercised when she came to the period of life at which she was capable of entering into the enjoyment of the property. Then is the case altered, because there is a second period fixed for that purpose, which might not come so soon, viz. her marriage, as to which it is equally clear that even in that event she was to have the property subject to the interposition of the trustees for her benefit?

Upon the construction of the will, therefore, I am of opinion that there was no trust or interest in Mrs. Lancashire independently of the power: and that the trustees not having thought proper to exercise the power during the life of the niece, they could not exercise it afterwards.

Then comes the last question, which is equally clear, whether, if the power had survived, and if, under the existing circumstances of the parties, the trustees had had the power of taking from the heir of Sarah that *which the testator had given [*664] to Sarah, the power has in point of fact been executed.

It is quite clear that it was a power to the two trustees originally named, or to those who might be substituted in their place. It was to the trustees, in the plural, for the time being. At all events, it was not a power in one. Hutchinson, one of the original trustees, by a deed of 1831, recites his desire of no longer acting in the trust, and an attempt is made to substitute Osborne

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in his place ; but it is not pretended that Osborne was duly appointed, the concurrence of the party beneficially interested being wanting. From that time to 1842 it does not appear that Hutchinson in any way interfered in the trust. He had formally withdrawn, and no longer interfered with the property. Now to say that after that he stood in the situation in which the testator intended that the parties who were to exercise the power were to stand, is falsifying every expression in the will. He was not, at the time he was induced to execute the deed of 1842, a trustee in the sense in which the testator used the word ; for though he had originally accepted the trusts, the will gave him the power of retiring from them, and he had long before availed himself of that power, and formally declared his retirement. I am therefore clearly of opinion, that as the exercise of the power required the concurrence of two trustees, as Osborne was never duly appointed a trustee at all, and as Hutchinson had long before ceased to fill that character, there were, in 1842, no persons competent to exercise the power.

But, assuming for the moment that, notwithstanding the deed of 1831, Hutchinson was competent to have joined as trustee in the deed of 1842—has he done so ? has he exercised the discretion which that act would involve ? The facts prove directly the reverse. They prove that he continued, up to the [*665] very last moment *to which the transactions refer, in the very same state of mind as when he executed the deed of 1831. He had retired from the trust, and he still refused to return to it ; at least he refused to resume the responsibility incident to the execution of it ; for it appears, from the deed of indemnity to which he was a party, that the language he used was, I will not interfere at all, unless you will undertake to bear me harmless, whatever may be the consequences of the act. It comes in fact to this, that Hutchinson had not resumed his position of a trustee, but that he executed the deed because he was asked, and that he declined to do more than formally to be a party to a deed, which, if it was not accompanied by the exercise of the discretion which the testator meant to repose in those who should execute the power, was a breach of the duty, which, as trustee under the will, he ought to have discharged. His duty was to

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exercise a discretion, not to execute a mere formal deed. The facts clearly demonstrate that he was at the time of signing the deed of 1842 as completely a stranger to the trust as he determined to be in 1831.

This latter point seems to have been the ground on which the Vice-Chancellor proceeded ; and, perhaps, he was quite right in resting on one ground, finding that to be sufficient : but, as I have formed a very clear opinion on all the points in which this decree is impeached, it may be satisfactory to the parties to know that, in my view at least, there is no ground, in any one of the arguments brought forward in support of the appeal, upon which it can be maintained.

Then as to the costs, I am perfectly clear that the decree is right in that respect also. On the will, independently of the subsequent instruments, there is really "no question" [*666] at all, but that there was no trust in favor of Mrs. Lancashire. And so, I presume, she was advised : else, why all that machinery to give her another title ? Even if the case had rested on the will alone, I should not have thought there was doubt enough to protect her against the costs of the suit ; but, as she has taken upon herself to execute a deed with a view to alter the relative situation of herself and the other parties interested, and as she has rested her title on her own acts, it is quite clear that she ought to pay the costs of the suit, to which will now be added the costs of this appeal.

THE STOCKTON AND HARTLEPOOL RAILWAY COMPANY v.
THE LEEDS AND THIRSK AND THE CLARENCE RAILWAY
COMPANIES.

1848: Aug. 5, 7.

Seemle, where the right of a party to petition parliament against a bill pending there depends solely upon his having some private interest which is likely to be affected by it, this court has the same jurisdiction to restrain him by injunction from so petitioning, as it would have to restrain him from bringing an action at law or asserting any other right connected with such interest.

1848.—*Stockton and Hartlepool R. Co. v. Leeds and Thirsk and the Clarence R. Cos.*

THIS was a motion to dissolve an injunction granted by the Vice-Chancellor of England, to restrain the Leeds and Thirsk Railway Company from opposing a bill brought into the House of Lords by the Clarence Railway Company, for the amalgamation of the latter company with the former, or doing any act to prevent or delay the passing of such bill into a law.

The circumstances of the case were in substance these :—In the year 1844, the Clarence Railway Company, under the authority of an act of parliament, granted a lease of their railway for twenty-one years to the Stockton and Hartlepool Company, reserving to themselves, by the same authority, the right [*667] to purchase the stock and engines of the Stockton and Hartlepool Company at the end or sooner determination of the term upon certain conditions. In the year 1846, an act of parliament was passed to enable the Leeds and Thirsk company to purchase the Stockton and Hartlepool Railway, and a contract was entered into between those two companies for that purpose ; but, before the terms of it were finally settled, the directors of the Leeds and Thirsk Company, having become informed of the relation subsisting between the Stockton and Hartlepool and the Clarence Companies, entered into negotiations with the directors of the latter company for the purchase of that railway also ; and, the project having been sanctioned by the shareholders of both companies, it was arranged that the Clarence Company should have the conduct of a bill in parliament to authorize the carrying of it into effect ; and they accordingly forthwith took all the necessary steps for introducing such bill in the ensuing session.

This arrangement between the Leeds and Thirsk and the Clarence Companies having been communicated to the Stockton and Hartlepool Company, the contract before mentioned between that company and the Leeds and Thirsk, which had been duly ratified by three-fifths of their respective shareholders, was, on the 13th of January 1847, definitively concluded and reduced into writing ; and it was thereby provided, among other things, that the purchase to which it referred should be completed within three weeks from the passing of the act for the purchase of the Clarence Railway by the Leeds and Thirsk Company ; and that

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the Stockton and Hartlepool Company, and especially its directors, should use their best endeavors to promote the completion of that purchase.

*In the spring of 1847 a bill was, in pursuance of the [*668] above-mentioned arrangement, introduced by the Clarence Company into the House of Commons, where it was read a second time and referred to a select committee; but, after the committee had reported in its favor, and the report had been agreed to, there not being time to carry the bill through its subsequent stages in that session, further proceedings upon it were suspended, and, by virtue of certain special resolutions of both Houses of Parliament, leave was given to resume them in the following session of 1848. In the meantime, however, some disagreement having arisen between the directors of the two companies respecting the subordinate clauses and provisions of the bill, the Leeds and Thirsk Company, who had promoted the progress of it throughout the session of 1847, gave notice to the Clarence Company that they declined to pledge themselves to a similar course in the event of its reintroduction in the next session, and that they should then hold themselves at liberty to assent or dissent from its passing as circumstances might render necessary; and on the bill being brought into the House of Lords by the Clarence Company in the session of 1848, the Leeds and Thirsk Company presented a petition against it: whereupon the bill in this cause was filed, alleging that, previously to the negotiation for the purchase of the Clarence Railway, the 1st of July 1847 had been named as the time for the completion of the purchase by the Leeds and Thirsk Company of the Stockton and Hartlepool Railway, and that the period of three weeks after the passing of the act to authorize the other purchase had been substituted at the request of the directors of the Leeds and Thirsk Company, and on the faith of a promise on their part that they would use their best endeavors to advocate and promote the passing of such bill.

*The bill also alleged that the terms of the agreement [*669] between the Leeds and Thirsk and the Clarence Companies had been definitively settled by the directors of those companies in November 1846, when the project for the amalgama-

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tion of those companies was ratified by the respective shareholders thereof; but it charged that, even if such were not the case, it would furnish no sufficient reason for the Leeds and Thirsk Company opposing the bill now pending, its provisions being obligatory, but permissive only, and their operation contingent upon three-fifths of the subscribers of both the companies concerned agreeing to act upon them; that it was evident from that circumstance, as the fact was, that such opposition was not founded on any *bona fide* objection to the provisions of the bill, but that it proceeded entirely from a desire on the part of the Leeds and Thirsk Company to defeat and delay the rights and remedies of the plaintiffs under their agreement of January 1847, and in the hope that, by preventing the said bill from passing in the present session (which would be the effect of the opposition,) the completion of that agreement might be evaded, or, at all events, the time for such completion delayed. And it further charged, that if the Leeds and Thirsk Company could point out any clause in the bill which could be construed as obligatory, and not merely permissive, the Clarence Company were willing to modify them in such a manner as to make them clearly and indisputably permissive only.

The bill prayed, in addition to the injunction, that, if necessary, the agreement of January 1847 might be specifically performed.

The defendants, the Leeds and Thirsk Company, in [*670] their affidavits in opposition to the motion for the *injunction, denied that the terms of the agreement for the purchase of the Clarence Railway had ever been definitively settled or ratified; in confirmation of which they referred to the resolutions passed at a general meeting to which the project of amalgamation had been submitted in November 1846, from which it appeared that the assent then given by the shareholders was expressly subject to the condition that such clauses should be inserted in the bill as their directors should in their discretion approve.

On the hearing of the appeal motion, the *Solicitor-General*,

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Mr. *Walker*, and Mr. *G. Russell*, appeared for the Leeds and Thirsk Company (the appellants.)

Mr. *Bethell* and Mr. *Prior* for the plaintiffs.

Mr. *Stuart* for the Clarence Company.

The counsel for the appellants did not dispute the jurisdiction, but only the propriety of its exercise in the particular case.

Aug. 7.—THE LORD CHANCELLOR.—In this case, which is an application to restrain a party from petitioning against a railway bill pending in parliament, I have much satisfaction in finding (and it is no more than what I expected from the learned counsel engaged on the part of the defendants,) that no question has been raised here as to the jurisdiction of the court to interfere in a case of this kind if a proper case were made. There is no question whatever about the jurisdiction; a party who comes to oppose a railway bill in parliament does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to parliament. He is not even allowed to be heard as a petitioner against the bill, unless he has a *locus standi* in respect of some property or interest liable to be affected by it, if it should pass into a law. This court therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in parliament as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims. About that there can be no question whatever: nor could any doubt be raised about it, except by the same confusion of ideas which gave rise to the old discussion between courts of law and equity which has been so long set at rest, and which was founded on the supposition that the injunction operated upon the court and not on the party. Having, therefore, no doubt as to the jurisdiction, I proceed to inquire whether a proper case is here made for its exercise.

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Now the whole is founded on the agreement of the 13th of January 1847; but it is to be observed that that agreement contains no contract on the part of the Leeds Railway Company with the Stockton Railway Company respecting the purchase of the Clarence Railway. The Stockton Railway Company indeed, by that agreement, contract to promote the completion by the Clarence Railway Company of the sale of that railway to the Leeds Company; but there is no contract, on the part of the Leeds Railway Company to do anything with respect to that contract with the Clarence Railway Company. The bill, however, is not upon the ground of contract, but on the ground of fraud which is said to consist in this, that the Leeds Railway

Company, having concluded their contract for the Clarence Railway, but which required "an act of parliament to give it effect, and having purchased the Stockton Railway under an agreement that such purchase should be completed within three weeks after the passing of the Act for the purchase of the Clarence Railway, are opposing that Act, in order to deprive the plaintiffs of the benefit of that provision in their contract. But, in order to found an equity upon those circumstances, they must prove that the Clarence Railway Company are entitled to have that Act passed: for if they are not, it follows that those against whom it is to be pressed in parliament have a right to resist it, and there can be no fraud therefore in opposing it. But it appears to me to have been very clearly established, that the Clarence Railway are not so entitled, for the evidence shows, first, that the Act was to be only consequential upon the agreement, when its terms should be definitely concluded; and, secondly, that no such agreement has yet been concluded. With respect to the latter of these propositions, indeed, the bill charges, that it is immaterial, and that, even supposing no such contract to have been concluded, the plaintiffs are still entitled to the injunction. But for that charge I am of opinion that there is no foundation whatever. For if there were no concluded contract, but only an intended contract, there could be no violation of duty in resisting the bill, which was only to give effect to such intended contract. On the contrary, the attempt to pass the bill, under such circumstances, for any col-

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lateral purpose, would be a violation of duty on the part of the Clarence Railway Company, and would justify the Leeds Company in opposing it. In that case, therefore, the injunction would operate not to prevent, but to facilitate, a violation of equity and duty.

I am of opinion, therefore, as the Clarence Railway Company had no right, as the matter stands, as against "the [673] Leeds Railway Company, to press any thing which is for the purpose of completing this contract, no such contract in fact having been finally agreed upon, that the Stockton Railway Company acting, as they evidently are, in connection—I should rather say in collusion—with the Clarence Railway Company, have no such right as against the Leeds and Thirsk Railway Company, and, consequently, that the injunction must be discharged, and that the application for the injunction before the Vice-Chancellor ought to have been refused with costs.

STAMPS v. THE BIRMINGHAM AND STOUR VALLEY RAILWAY COMPANY.

1848: July 29; Aug. 7, 8.

Where the ground on which an injunction had been granted was displaced by matters which occurred subsequently to the filing of the answer, the court refused to dissolve the injunction on an affidavit of those matters, but gave leave to the defendant to introduce them upon the record by a supplemental answer.

A Railway Company is entitled, under the Lands Clauses Consolidation Act, to give a second notice to the same landowner for land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under the first notice turn out to be insufficient for the authorized purposes of their railway.

THE plaintiff was the owner of a small house which stood on the top of a hill, in the proposed line of the defendants' railway. The defendants, intending originally to drive a tunnel through the hill, served the plaintiff with a notice under the 18th section of the 8 Vict. c. 18, (Lands Clauses Consolidation Act,) to treat for a portion of the land of a certain depth underneath

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his house ; and, having duly obtained possession thereof, they proceeded to tunnel through the hill, in the course of which some damage having been done or threatened to the foundations of the plaintiff's house, he filed this bill for an injunction, and an account and payment of the damage alleged to have [*674] been already *sustained : and an injunction was granted by Vice-Chancellor Wigram on motion.

The defendants then, finding that the hill was not composed of rock sufficiently solid to admit of tunnelling, resolved to make a cutting through the hill instead, for which purpose they served the plaintiff with a further notice to treat for the purchase of his house, and the whole depth of the soil beneath it. But before the compulsory process prescribed by the act in such cases could be gone through, the defendants were compelled, by threat of an attachment, to put in an answer, in which, of course, the fact of such proceedings having been taken was not stated. Shortly, however, after those proceedings were completed, the defendants moved, upon an affidavit of them, that, upon payment of the additional purchase money and the costs of the suit, the injunction might be dissolved, and further proceedings in the suit stayed. But the Vice-Chancellor, though upon the merits inclined to grant the motion, refused to stay the proceedings, on the ground that the bill prayed not only an injunction, but an account of damage actually sustained ; and he refused to dissolve the injunction, on the ground that the facts on which the motion rested were not stated in the answer, and, therefore, if the cause should go on to a hearing, it would appear that the injunction had been dissolved upon facts not in issue in the cause ; and he intimated that, to enable the court to interfere in the manner prayed, the defendants must either file a supplemental answer or a cross bill.

On the motion being now renewed, by way of appeal, before the Lord Chancellor, his Lordship, after hearing counsel in support of it, expressed his concurrence with the opinion of [*675] the Vice-Chancellor on both the above *points, but allowed the motion to stand over, with liberty to the defendants to make such application as they should be advised.

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Aug. 7.—Accordingly, on a subsequent day, the defendants moved for leave to file a supplemental answer, for the purpose of stating the proceedings which had been taken since the filing of the former answer.

The *Solicitor-General* and Mr. *James Parker*, in support of the motion, cited *Jackson v. Parish*(a) and *Fulton v. Gilmore*;(b) but they relied chiefly on *Bousfield v. Paterson*;(c) where leave had been given to file a supplemental answer for the purpose of stating the probate of a will granted subsequently to the filing of the original answer.

Mr. *Rolt* and Mr. *Terrell*, *contra*, said, that, with the exception of the last case, which did not appear to have been discussed, all the other instances in which leave had been granted to file a supplemental answer were cases in which the new facts proposed to be stated had occurred prior to the filing of the original answer, but had been omitted or mis-stated through ignorance or mistake: and that the only way in which matter, properly speaking, supplemental could be introduced on the record was by supplemental bill. That if such facts were introduced by answer and the plaintiff had occasion to reply to them, he would have to file a supplemental bill himself, which would only be relieving one party of a burden to impose it on the other.

*The *Solicitor-General*, in reply, observed, that in the [*676] case just put, an amendment of the bill would suffice, and no supplemental bill would be necessary: *Knight v. Matthews*.(d)

THE LORD CHANCELLOR.—In some way or other it is clear the defendants must have an opportunity of bringing these facts forward: for it would be productive of great injustice if the court were bound at the hearing to decide on the facts, not as they actually stood then, but as they stood some time before.

(a) 1 Sim. 505.

(b) 1 Phill. 522.

(c) 1 Smith's Pr. 373, 3d ed.

(d) 1 Madd. 566.

1848.—*Stamps v. The Birmingham and Stour Valley Railway Company.*

The only question is as to the mode in which that is to be done. The objection that it is an attempt to alter the issue which has been joined, applies as strongly to bringing new facts forward by supplemental bill as by answer. On principle it is difficult to see why it may not be done by supplemental answer. For there is no doubt that a defendant may introduce in his original answer any thing that has happened before putting it in, though subsequently to the filing of the bill. What is the difference when he asks to do it by supplemental answer? If the defendant in this case could have delayed putting in his answer till these proceedings had been taken, he would have introduced them there: all he asks is to be allowed to supply those facts by a supplemental answer. There seems to be an absence of satisfactory authority on the subject: but the only authority there is, is in favor of the application. As, however, it is of importance not to interfere with established practice, I will look into the authorities that have been cited before I dispose of the case.

On the following day,

[*677] His Lordship said, the order reported in *Smith* appeared to have been made on notice, though it did not appear whether it had been discussed: but, for the reasons he had expressed yesterday, he thought the practice a proper one, and should therefore grant the application.

A supplemental answer was accordingly filed, and the motion for dissolving the injunction being then renewed, the only question was, whether the company had not, by the limited notice first given, exhausted their compulsory powers under the act, and whether their subsequent notice and the proceedings consequent upon it had given them a title to any thing more than they had acquired by the first.

On this question *Webb v. Manchester and Leeds Railway*,^(a) *Moncrief v. Maule*,^(b) *Simpson v. Lancaster and Carlisle Railway*,^(c) were referred to.

(a) 4 My. & Cr. 116.

(b) 5 Bell's App. Cas. 333.

(c) 4 Rail. Cas. 625.

1848.—*Staamps v. The Birmingham and Stour Valley Railway Company.*

THE LORD CHANCELLOR.—It does not appear that the act has expressly laid down any rule at all, but simply that the company are to give notice of what land they require ; in other words, that they cannot take any land *without* notice. The plaintiff however goes further than that, for he contends that the company are bound to determine once for all what quantity of land they will require, and that when they have taken a certain quantity under one notice, "they cannot afterwards, if they [*678] find it insufficient, come for more.

I am of opinion, however, that nothing could be more inconvenient than to lay down such a rule. The company is naturally desirous of taking as little land as is necessary for their undertaking. But a thousand unforeseen circumstances may occur in the progress of their works, which may make it necessary for them to have more land than they originally calculated on. And until the works are complete, they cannot be certain whether they may or may not require more land than they at first gave notice for. Of this the case now under consideration is one instance ; that of *Webb v. The Manchester and Leeds Railway Company*,^(a) is another ; and it is plain that the effect of laying down such a rule as the plaintiff contends for would be either to compel these companies in all cases to take more land than they will probably want, or if they happen to give notice originally for less than they eventually require, to put them at the mercy of the landholder ; while, on the other hand, the inconvenience to the landowner from the contrary rule is comparatively trifling.

An argument was indeed attempted to be drawn from those cases in which it has been decided, that where a company has given a notice to take land, they cannot afterwards recede from it : but it does not follow, because the notice constitutes a contract on their part to take the land comprised in it, that, having given notice to purchase one acre, they cannot afterwards give a further notice to purchase another.

"It is unnecessary to advert to earlier cases, for the [*679] question seems to have arisen under circumstances similar to the present in *Simpson v. Lancaster and Carlisle Rail-*

(a) *Ub. supra*

1848.—*Stamps v. The Birmingham and Stour Valley Railway Company.*

way ; and the Vice-Chancellor of England there laid down what I think is the reasonable rule of construction, assigning the same ground for his opinion that I have done. I quite concur in the view which his Honor took of the subject in that case ; but the present case is a much stronger one : for there the purpose for which the additional land was wanted was a station, the building of which in that particular spot might be more or less convenient for the traffic of the company : whereas here the possession of the land in question is absolutely indispensable to the completion of the railway.

This construction of the act is more consistent than the other with what may be presumed to have been the intention of the legislature, for it is that which the interest of these companies requires, and which does not expose landowners to anything like the inconvenience to which the contrary construction would subject the companies. I think the act is not only capable of such a construction, but that it is the right and proper one ; and, therefore, as the company have now taken all the steps which the act prescribes for acquiring possession of this new land, the ground on which the injunction was originally granted has ceased to exist ; and the injunction must be dissolved.

As to costs, it is not now in dispute that the injunction was originally correct, and the defendant has only got rid of it by subsequent acts ; therefore, as the Vice-Chancellor refused the motion to dissolve it with costs, and I agree with his view, I leave that order as it stands. As to the present motion, [680] there has undoubtedly been "an attempt to put the company into a position in which they would be unable to go on under the powers of their act ; but, as they have acquiesced in what was intimated in the course of the discussion, that they could not go on with the motion as the pleadings then stood, they must pay the costs of the appeal motion.

Mr. *Rolt* asked that the defendants might be put on terms to give reasonable notice to the plaintiff before they took possession of his house.

THE LORD CHANCELLOR.—I cannot interfere with that. I

1848.—*Stamps v. The Birmingham and Stour Valley Railway Company.*

have decided that there is no ground now for the injunction. The rest must be matter of arrangement.

ELDERTON *v.* LACK AND ANOTHER.

1848: May 11.

At the hearing of a suit to enforce an equitable security for the payment of an annuity which was impeached on the ground of a defective statement of the consideration in the memorial, the court below directed an issue to try whether the deed was a good, valid, and binding deed, and whether the plaintiff was, by virtue thereof, entitled to recover the annuity, but at the same time ordered that the defendant should, on the trial, admit the due execution of the deed (such execution having been regularly proved in the cause.) Held, on appeal, that the direction as to the admission was inconsistent with the form of the issue: and further, that, as the plaintiff's title to relief in equity depended on a legal right, the court ought not to interfere with the trial of that right in a court of law by requiring the defendant to admit any fact upon which it depended.

THE object of this suit was to enforce payment of an annuity granted by the defendant Lack to the plaintiff by an indenture of covenant of April 1839 and which was thereby charged upon a pension of 1000*l.* a year, to which Lack was entitled. The other defendant, Hall, who was the grantee of another annuity similarly *secured by a deed of subsequent date, [*681] alleged that he had purchased his annuity without notice of the plaintiff's; and the defence which both he and Lack set up by their answers was, that the memorial of the plaintiff's annuity was defective, inasmuch as it did not state, as part of the consideration, the cancellation of a former annuity deed executed in November 1838.

At the hearing of the cause before the Master of the Rolls, the deeds of April and November being proved in the usual way, his Lordship directed the following issue—Whether the deed of April 1839, was a good valid, and binding deed, and whether the plaintiff, was, by virtue thereof, entitled to recover the annuity thereby covenanted to be paid: and the defendants were to be at liberty to appear and defend separately; and they were directed to admit that the deed of April 1839 and the deed of Novem-

 1848.—*Elderton v. Lack*.

ber 1848 therein recited, and for which it was substituted, were respectively signed, sealed, and delivered by the several parties thereto respectively.

The defendants appealed from that part of the order which related to the admission.

Mr. *Lee* and Mr. *Heathfield*, for the appellant, objected to it, as depriving the defendant of the opportunity of cross-examining the witnesses to the deeds. They cited *Butlin v. Masters*,^(a) and contended, that, as the plaintiff's title to equitable relief depended entirely on the legal validity of the security under which he claimed, he ought to be left to establish his right at law, in the usual way, without any further interference by this court than what was necessary to put the question in such a [*682] train for adjudication as that both *the defendants might be bound by the decision; for which purpose alone an issue had in this case been directed, instead of leaving the plaintiff, as in *Butlin v. Masters*, to bring an action.

Mr. *Walpole* and Mr. *Elderton*, for the plaintiff contended that the doctrine of *Butlin v. Masters* applied only to cases in which the jurisdiction of this court was resorted to as ancillary to a legal right, and not where the plaintiff came here upon an equitable title, as in the present case: for though the right here claimed by the plaintiff depended on the legal validity of an instrument, his only substantial remedy was against the pension upon which the annuity was charged. That not only had the execution of the deeds been proved in the cause, but it had not been put in issue by the answers, the only question raised by them being as to the validity of the memorial, which was purely a question of law and not of fact.

THE LORD CHANCELLOR.—What was the object of this direction? Merely to save the expense of proving the deed at the trial?

Mr. *Walpole*.—Yes.

(a) *Ante*, pp. 591, and 599.

1848.—Elderton v. Lack.

THE LORD CHANCELLOR, without calling for a reply.—It appears to me that the very terms of the issue go far to exclude the propriety of the direction which is the subject of this appeal. The issue is to try whether the deed is a good, valid, and binding deed. How can I say that nothing may come out on the cross-examination of the witnesses to show that it is not good, valid, and binding? It is not very consistent with that inquiry to exclude the testimony of the best possible *witnesses who can speak to it. It may be that the only ground on which the validity of the deed is impeached upon the pleadings, is the defectiveness of the memorial; but the order for the issue is general; and it seems most essential to the inquiry, as directed by that issue, that these witnesses should be called by the plaintiff, in order that the defendants may have an opportunity of cross-examining them. [663]

The whole demand in equity arising out of a legal right, the court very properly sends that right to be tried in a court of law. By the ordinary rule, the plaintiff would have had to bring an action; but, on account of the situation of the parties an action would not meet the case, and on that account, and that only, an issue is directed. Under such circumstances, I think the whole affirmative of the issue ought to be upon the plaintiff, as it would have been if the court had simply left him to his action.

See the next case.

DUKE OF BEAUFORT v. MORRIS.

1848: July 22.

On a bill to restrain the continuance of a trespass alleged to have been actually committed, the court, in putting the plaintiff to his action, will not require the defendant to admit any fact that enters into the question of trespass, at least unless such fact be clearly and unqualifiedly admitted in the answer.

THIS was a similar case to the last: the bill praying an injunction to restrain the defendant from working his colliery in such a manner as to allow water to pass from it to a colliery which was worked by the plaintiff on a lower level.

1848.—Duke of Beaufort v. Morris.

[*684] *At the hearing of the cause before Vice-Chancellor Wigram, his Honor had retained the bill, with liberty to the plaintiff to bring an action in which the defendant was to admit that he had made a communication between his colliery and that worked by the plaintiff, and that water passed by it.

Mr. *Walpole*, for the defendant (the appellant,) who complained of being required to make that admission, said that the facts embraced in it were in issue on the pleadings, and that much of the evidence in the cause related to them.

Mr. *James*, for the plaintiff, having disputed that, the Lord Chancellor asked him if he was prepared to take the admission from the answer, which he declined to do, on the ground that it would let in the whole answer as evidence.

THE LORD CHANCELLOR.—Then you must show me that the subject matter of the admission is not a matter in issue in the cause. An admission on the pleadings must be quite clear and free from all doubt, before I can call upon a party to admit at the trial anything which enters into the plaintiff's legal right.

Mr. *James* then observed, that, though the facts required to be admitted were beyond all doubt, the plaintiff would be under great disadvantage in proving them, because the evidence must all come from persons in the defendant's employ.

On the conclusion of the discussion

[*685] *THE LORD CHANCELLOR repeated the substance of his concluding observations in the last case, adding, that he did not see what right the court had, in a case of this kind, to call on the defendant to make any admission, when it merely says to the plaintiff, You must establish your legal right before you come here.

The part of the decree requiring the admission was, accordingly, reversed.

See the last case.

1848.—The Attorney-General v. The Corporation of Ludlow.

ATTORNEY-GENERAL v. THE CORPORATION OF LUDLOW.

1848: June 6.

Charity trustees appointed under the 5 & 6 W. 4, c. 76, are invested by their appointment with all the rights and powers, as such trustees, which formerly belonged to the corporation or corporate officers for whom they are substituted.

Where exhibitions are provided out of the surplus funds of a grammar school, none but boys who are objects of the charity ought to be eligible to them. Observations on *The Attorney-General v. The Earl of Stamford*, 1 Phill. 737.

ON exceptions to the Master's Report approving of a new scheme for the management of the Free Grammar School at Ludlow, which was one of the charities which at the time of the passing of the Municipal Corporation Act were vested in the corporation of that town, and the funds of which had, by the effect of a compromise with the corporation in this suit, been considerably increased,

The following questions arose :—

1st. Whether the power of nominating and removing the head master, which had formerly belonged to "the [686] corporation, was now vested in the trustees appointed under the Municipal Corporation Act,(a) or whether such trustees were merely depositaries of the legal estate in the charity property; the Master having in his scheme so treated them, and having proposed to give the management of the property and all discretionary powers involved in the working of the scheme to a distinct body of persons, to be called Governors.

2dly. Whether boarders should be eligible to the exhibitions at the Universities, which the scheme proposed to provide for out of the surplus funds; or whether the benefit of such exhibitions should be confined to the day boys from the town, who were alone the objects of the charity.

On the first question, the cases of the *Oxford Charities*,(b) of the *Grammar School of Shrewsbury*,(c) and of the *Norwich Charities*,(d) were referred to, as showing that the right was in the new trustees.

(a) 5 & 6 W. 4, c. 76, s. 71.

(b) 3 Myl. & Cr. 239.

(c) 1 Myl. & Cr. 632.

(d) 2 Myl. & Cr. 275.

1848.—*The Attorney-General v. The Corporation of Ludlow.*

On the second question, the observations of Lord Lyndhurst in *The Attorney-General v. The Earl of Stamford*(a) were referred to in support of the eligibility of boarders, and as having thrown some doubt upon the opposite doctrine previously laid down by Lord Cottenham in the same case : but it was observed on the other side, that the discrepancy between the two decisions did not turn upon a difference of opinion as to the general doctrine propounded by Lord Cottenham, but only upon its applicability to that particular charity.

[*687] *THE LORD CHANCELLOR.—On the first of the two points which have just been discussed, whether the trustees appointed by me under the Municipal Corporation Act have now the powers which the corporation originally had, I have only to repeat the opinion I have expressed in the course of the argument. All the interest and all the powers of the corporation as trustees ceased on the passing of the act. Then these being taken out of the corporation, the act provides that the Lord Chancellor shall make such orders as he shall see fit for the administration, subject to their respective uses or trusts, of the trust estates, and under that provision the new trustees have been appointed. There is nothing here more than in the ordinary case of an appointment of new trustees in the room of others originally invested with certain powers. To ascertain the powers belonging to the new trustees, we have only to look and see what were the powers of the corporation antecedently to the passing of the act, for the act only substitutes one authority for another. I think, therefore, that the trustees actually appointed have all the powers which the corporation before had, and that there is no ground for dividing the trust, by vesting the legal property in one party, and the discretionary powers in another.

As to the exhibitions, I am glad to find that I am not restrained by Lord Lyndhurst's decision from acting in this case upon the principle which I laid down in *The Attorney-General v. Lord Stamford*. It is very important that no part of a charity

(a) 1 Phill. 737.

1848.—The Attorney-General v. The Corporation of Ludlow.

fund should be applied to the benefit of persons not objects of the charity. The only way in which the practice of taking boarders in these schools has been justified, is, that, though you are employing the master in teaching other "boys" [*688] besides those who are objects of the charity, you are thereby enabled to obtain the services of a superior class of men as masters, and so the charity gets an equivalent. In that case you do not divest any part of the charity fund: you merely assume that the master has leisure time after teaching the boys on the foundation, and authorize him to employ it to a purpose indirectly beneficial to the charity. But the admission of boarders to exhibitions is very different. Lord Lyndhurst evidently misunderstood the ground on which the opinion I expressed in that case was founded; but in the observations which he made on that part of my judgment he proves the correctness of the real ground: for, in accounting for the circumstance of the exhibitioners having been taken in a much larger proportion from boarders than from day-boys, he observes, that it was to be expected, because the boarders had in various ways much greater advantages than the day-boys; and that it was the very reason why their admission is so unfavorable to the boys who are the real objects of the charity.

I have, therefore, no hesitation in this case in confining the benefit of the exhibitions to boys who are really objects of the charity.

The *Solicitor-General*, Mr. *Hill*, Mr. *Twiss*, Mr. *Rolt*, Mr. *Lloyd*, Mr. *Wray*, Mr. *Blunt*, and Mr. *Lewin*, appeared for different parties.

*WHITE v. JOHNSON.

[*689]

1848: July 28.

Where executors against whom a decree has been obtained in a creditor's suit, wish to stay proceedings in a similar suit instituted against them by another creditor in a different branch of the court, the motion ought to be made in that branch of the court to which the latter suit belongs, and not in the other.

 1848.—White v. Johnson.

MR. BIRD, on behalf of executors, defendants in a creditor's suit, in which Vice-Chancellor Knight Bruce had made a decree, moved for leave to make an order in that branch of the court, to stay proceedings in a suit which had been instituted against them by another creditor in the court of the Vice-Chancellor of England.

THE LORD CHANCELLOR.—I see no reason why Vice-Chancellor Knight Bruce should interfere to stay proceedings in a suit in the Vice-Chancellor of England's Court. The latter is the proper court to go to.

[*690] *IN THE MATTER OF LOWE'S ESTATE AND IN THE MATTER OF THE 1 W. 4, c. 60, AND THE 4 & 5 W. 4, c. 23.

1848 : Aug. 8.

A vendor, who dies before the completion of the contract, is a trustee within the meaning of the 4 & 5 W. 4 c. 23, though expressly excepted out of the 1 W. 4 c. 60.

LOWE had contracted for the sale of a small piece of land to a Railway Company for 120*l.*, but had died before the contract was completed, without heir or next of kin. Administration to his effects was taken out on behalf of the crown, and this was a petition by the administrator for a reference to the Master to inquire whether, as to the piece of land, he was a trustee within the meaning of the 4 & 5 W. 4, c. 23., and for the appointment of a person to convey it to the company.

The *Solicitor-General* and Mr. *Wray* appeared in support of the petition, and stated that the Vice-Chancellor of England had refused to make the order, on the ground that, as the case of an estate under contract for sale was expressly excepted out of the provisions of the 1 W. 4, c. 60,(a) which was incorporated by

(a) See sect. 16.

 1848.—In the Matter of Lowe's Estate.

reference into the 4 & 5 W. 4, c. 23, s. 6., it must be taken to be equally excepted out of the provisions of the latter act. But they contended, that, as the provisions so incorporated related only to the summary form of procedure given by the act, and not to the cases to which such form of procedure was to be applicable, and as the case of land under contract for sale had not been excepted in the second act, it must be considered as included in it.

THE LORD CHANCELLOR, being of that opinion, made the order.

 *ROCK v. COOK.

[*691]

1848: Aug. 9.

An application by a sheriff who, in the execution of a *fi. fa.* for costs under the order of May 1839, had seized goods which were claimed as the property of third parties, to be protected from an action, and that the claimants might come in *pro interesse suo*, refused: the sheriff not being, like a sequestrator, an officer of this court, and the protection given to him by the Interpleader Act being confined to execution of process at law.

In executing a writ of *fi. fa.* issued under the general orders of May 1839, for costs, the sheriff seized some goods in the house of the party, which were claimed by third persons as their property.

Mr. Cooke now moved on behalf of the sheriff, by way of appeal from Vice-Chancellor Knight Bruce, by whom a similar motion had been refused, that the claimants might be ordered to come in *pro interesse suo*, as in the case of a sequestration under the order of this court; and that the sheriff might in the mean time be protected from an action.

THE LORD CHANCELLOR.—In the case of a sequestrator, or a receiver, which is the same thing, the court will not allow an action to be brought, because they are its own officers. But here it is the sheriff, who is not an officer of this court. There is,

 1848.—*Rock v. Cook.*

therefore, no question about having the process of the court inquired into at law. The sheriff takes the goods at his peril: if he takes the wrong ones, he is liable to an action.

Mr. *Cook* then referred to the Interpleader Act,^(a) submitting, that this case was within the mischief which that act was designed to remedy in reference to the execution of such [*692] writs when issued out of courts of law; "and that as the act was passed before those writs had been given to courts of equity, the Lord Chancellor, as head of those courts, would upon the equity of the statute apply the analagous remedy now asked for.

THE LORD CHANCELLOR.—There is certainly no reason why the sheriff should not have the same protection here as at law; but I must find it in the act; I cannot create it. I consider the claimants quite strangers; and I have no power as Chancellor to extend the jurisdiction to persons who are not parties to the suit. The sheriff, when he had this new duty imposed upon him, ought to have been protected as he is at law in the discharge of it. But it was not foreseen. He is not an officer of this court, and, therefore, the rule which applies to officers of the court does not apply to him.

Motion refused with costs.

RAVEN v. KERL.

1848: June 7.

Upon a reference to inquire whether it was for the benefit of infants in whose name a suit had been instituted, that the same should be prosecuted, the Master reported that it was, and exceptions to his report were overruled; but a petition to confirm the report, and for payment by the defendant of the costs of the reference, was, by the court below, ordered to stand over till the hearing of the cause. Held, on appeal, that such an order was contrary to the practice, and it was discharged, and an order made according to the prayer of the petition.

(a) 1 & 2 W. 4, c. 58, s. 6.

1848.—*Raven v. Kerl.*

IN this suit, which was instituted by the father of several infants, on their behalf, against the trustees of an estate in which they had a contingent reversionary interest, Vice-Chancellor Knight Bruce made an *order, on the motion of [*693] the defendants referring it to the Master to inquire whether the suit was instituted for the benefit of the infants, and whether it was for their benefit that the same should be prosecuted, with liberty to state special circumstances.

The Master having found in the affirmative on both the inquiries, the defendants filed exceptions to the report, which were overruled on argument, but the costs thereof were reserved; and a petition subsequently presented by the plaintiffs, praying that the report might be confirmed absolutely, and that the defendants might pay the costs of the reference and consequent thereon, was ordered by the Vice-Chancellor to stand over till the hearing of the cause, with liberty to the plaintiffs to proceed with the cause as they might be advised.

The plaintiffs having appealed from that order,

Mr. Russell and *Mr. Fooks* appeared for the appellants.

Sir Francis Simpkinson and *Mr. Stinton* for the respondents.

THE LORD CHANCELLOR, after observing that the order of reference was made on motion, asked whether it was regular to apply by petition, to confirm a report on a reference so obtained, to inquire whether a suit ought or not to proceed?

Mr. Russell referred to *Fox v. Suwarkrop*,^(a) in which, after a reference similarly obtained, and a report finding *that the suit ought not to be further prosecuted, and [*694] exceptions to the report overruled, an application to dismiss the bill with costs, was made by petition.

THE LORD CHANCELLOR.—That may have been right, it was a further proceeding in the cause.

(a) 1 Beav. 583.

1848.—*Raven v. Kerl.*

This point, however, and all other questions as to the regularity of the proceedings, in point of form, were waived by mutual consent, as they had been below,^(a) and the only point discussed, was the propriety of the order appealed from; it being contended, on the part of the appellants, that, after exceptions to the report had been overruled, it was of course to confirm it at once, without waiting for the hearing of the cause.

On that point,

THE LORD CHANCELLOR said—I think the report at least ought to have been disposed of. It seems inconsistent to let the suit proceed as if it had been properly instituted, and yet to leave it open whether it was so or not. It would have been more consistent to confirm the report, if it required confirmation (as to which I give no opinion,) and to reserve the costs of the petition. But I see no reason why the court should not have also disposed of the costs at once. The defendants have taken an interlocutory proceeding in which they have failed. I do not see how any thing that can happen at the hearing can interfere with the consequence which naturally follows, or why, the intervention of the defendants at this stage having failed, [*695] *they should not pay the costs occasioned by it. It may very well be that a suit on behalf of infants may seem at the commencement to be for their benefit, and yet ultimately turn out otherwise: and the court does not, by overruling an objection to the propriety of the suit at this stage, preclude itself for dealing with it at the hearing according to the merits as they may then appear. It is possible that the costs of the cause may have to be paid by the next friend hereafter; but that would be no reason for throwing upon him the costs of an interlocutory proceeding on the part of the defendants, quite unconnected with the merits except so far as they can appear in this stage of the cause, and in which both the Master and the court have decided that the plaintiff is right, and the defendants wrong.

With respect to the mode in which the case has been brought

(a) See 1 Deg. & Smale, 243.

1848.—*Raven v. Kerl.*

on, if no one objects to it the point is not before me : but I think it right to mention it, that this case may not be made a precedent for a departure from the established practice of the court, which is a course which I have too often to complain of. There has scarcely been a step in these proceedings from the beginning to the end in which there is not some irregularity. For the exceptions themselves were irregular, being objections made to a report founded on an interlocutory order.^(a) The order of reference, too, is not in the usual form, the inquiry being not only whether it is for the benefit of the infants that the suit should be prosecuted, which is generally the only inquiry in such cases, but whether it was instituted with a view to their benefit. Suppose the suit should appear to be greatly for the benefit of the *infants, and very desirable to be prosecuted, is it [*696] to be stopped because you can make out that the next friend instituted it for some collateral purpose of his own? I do not say that the form of the order in this case may not in some cases be a proper one, but then it should be upon a special case made; where there is nothing special, the simpler form of order which I have mentioned, and which the registrar (Mr. Colville) tells me is the usual form, had better be adhered to.^(a)

See the next case.

DUNCAN v. VARTY.

1848: Aug. 7.

The costs of an issue directed on an interlocutory application may be disposed of after the issue decided without waiting for the hearing of the cause. *Malkin v. Price*, 2 Coll. 190, overruled.

THE suit was instituted by several persons, trustees under an act of parliament of a certain terrace walk in the neighborhood

(a) See *Otley v. Penam*, 1 Haro, 324.

(b) For the form of order where the objection is rather to the motives and character of the next friend than to the propriety of the suit itself, see *Nelder v. Hawkins*, 3 M. & K. 243; *Fox v. Szwarkop*, 1 New. 568.

1848.—Duncan v. Varty.

of St. James's Park, and also on behalf of themselves and all other the owners of the neighboring houses, for an injunction to restrain the defendant from cutting timber and exercising other acts of ownership upon the terrace.

On a motion before the Vice-Chancellor of England for the injunction, the defendant having disputed the fact of the plaintiffs' being trustees of the walk, an issue was directed to try whether they were so or not; and a verdict was on the first trial found for the plaintiffs, but on a second trial, which was granted

on the application of the defendant, there was a verdict [*697] for the defendant. Whereupon he moved before the

Vice-Chancellor for the costs of the motion for the injunction and of both the trials, including the costs of the motion for a new trial; all of which were granted, except the costs of the first trial.

Mr. *Schomberg* now moved, on behalf of the plaintiffs, to discharge that order, contending, first, that it was premature and contrary to the practice of the court to dispose of the costs of an issue directed upon an interlocutory application before the hearing of the cause; observing, that the result of an issue so directed was not conclusive, but might be overturned by the evidence adduced at the hearing. And he relied on *Malins v. Price*,^(a) in which it appeared from the report that the Vice-Chancellor had inquired into the practice, and found it to be as now stated. But, secondly, he contended, that, at all events, the plaintiffs ought not to have been ordered to pay the costs of the second trial, or of the motion for it, such trial being in the nature of an indulgence to the defendant.

THE LORD CHANCELLOR expressed great surprise at the supposed rule of practice which had been mentioned, and sent to inquire whether any of the officers of the court recollected having been consulted on the occasion referred to.

Mr. *Walker* and Mr. *Elmsley*, for the defendant, said, that

(a) 2 Coll. 190.

 1848.—*Duncan v. Varty*.

the ground on which the costs of the motion for the new trial had been given was, that the plaintiffs had not on the first trial, brought the case fairly before the jury, but had suppressed some material documents: for which reason the defendant had asked for the costs *of both the trials, though the [*698] Vice-Chancellor only gave him the costs of one.

[THE LORD CHANCELLOR.—If the order for a new trial contained no express direction for production of documents or admission of evidence, I cannot well assume that the court made it on the ground you mention—that the plaintiffs had misconducted themselves on the first.]

As to the application being premature, they observed, that it was not certain that the cause would ever come to a hearing: most probably it never would. But suppose the bill were ultimately dismissed with costs, the costs now in question would not be costs in the cause, and could only be got by a special application at some stage or other. Or, suppose the defendant moved to dismiss for want of prosecution; how could he get these costs?

THE LORD CHANCELLOR.—That would apply to all orders reserving the costs of interlocutory applications to the hearing of the cause.

Mr. *Schomberg* having replied,

THE LORD CHANCELLOR said—In this case there was an interlocutory application for an injunction. The title of the plaintiffs, as trustees, being disputed, the court directed an issue to try that question. On the first trial there was a verdict for the plaintiffs: but on a new trial the defendant succeeded. That verdict has not been, and is not now, called in question. No application has been made for a third trial, and no question is raised before me as to the correctness of the verdict *on the second. I must therefore, assume that the plain- [*699] tiffs' title as trustees is negatived, at least for the purpose

1848.—*Duncan v. Varty*.

and the question is, what is to be done with the costs of these proceedings.

The only doubt I have felt upon that point arose from what was said to have occurred in the case before Vice-Chancellor Knight Bruce, which was cited, and from which it would appear that, after consulting the officers of the court, his Honor ascertained that it was contrary to the practice to order upon motion, the payment of the costs of issues directed upon an interlocutory application. That was quite a new doctrine to me. The Vice-Chancellor Knight Bruce, indeed, seems to have yielded to it; but the Vice-Chancellor of England in the present case has adopted quite a different view of the practice, and the question therefore comes before me on a balance of authority.

Now it would be productive of great inconvenience if such a rule as is now contended for were to prevail, because it would make it necessary in all cases of this kind that the cause should go to a hearing; for the party who had succeeded on the issues would be compelled to bring the cause to a hearing, solely for the purpose of getting the costs of those proceedings. In many cases, however, the verdict on an issue directed upon an interlocutory application, disposes of the case. It is true such a verdict is not conclusive; but in a great majority of cases it practically is so. Such a rule, therefore, would be a most mischievous one, and I am happy to think that no such rule exists. I have sent to the offices to inquire whether any of the gentlemen there recollect this question having been referred to them on the occasion which has been mentioned, and the answer is, that [*700] they know nothing of any such reference. I must, therefore, dispose of this case upon my own view of what the practice ought to be.

An issue directed upon an interlocutory application is part of the interlocutory application. If the court had sent the inquiry to the Master, instead of to a jury, is it to be said that the costs of that inquiry are not to be disposed of until the hearing of the cause?(a) I think, therefore, the Vice-Chancellor was quite

(a) See *Rosen v. Kerl*, ante, p. 692.

 1848.—*Duncan v. Varty*.

right in disposing of the costs when he did : and the only remaining question is as to the substance of his order.

If the plaintiff had suppressed evidence, or been guilty of any other impropriety, the court might visit him with the consequences ; but if no such circumstances existed—and I must assume from the form of the order that none such did exist—the ground on which the second trial was directed must have been simply, that the jury were supposed to have miscarried on the first, in which case no costs would be given of the proceedings to set the error right. But, beyond all doubt, I should make the losing party pay the costs of one trial ; and that the Vice-Chancellor has done, and, therefore, it is not necessary to alter his order in that respect. But then there are the costs of the motion for a new trial. That was the necessary consequence of the first trial, and if the plaintiffs were not to pay the costs of the first trial, neither should they be compelled to pay the costs of the application for the new trial. In that respect, therefore, I think the order must be varied.

 *WEBB v. GRACE.

[*701]

1848: January 12: August.

A covenant to pay to E. C. during her life, subject to the proviso thereafter contained, an annuity of 40*l.* ; the proviso being, that in case E. C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to 20*l.* only, which sum should in such case be paid and payable to E. C. from the time of her marriage for the remainder of her life. Held (reversing the decision below) to be, in effect, a covenant to pay an annuity of 40*l.* until marriage, and afterwards an annuity of 20*l.* only : the proviso for reducing the annuity being part of the original gift itself, and not operating as a condition subsequent so as to be void as in restraint of marriage.

THE question in this case was whether Eliza Elborough, formerly Eliza Castle, was, after her marriage, entitled to an annuity of 40*l.* or only to an annuity of 20*l.* under a covenant entered into by John Webb, the testator in the cause, in the following words :

“ That John Webb shall pay to Eliza Castle, for and during
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1848.—Webb v. Grace.

the term of her natural life, subject to the proviso hereinafter contained, an annuity of 40*l.* : provided always and it is hereby declared and agreed by and between the parties hereto, and it is the true intent and meaning of these presents that in case the said Eliza Castle shall at any time hereafter happen to marry, then from and immediately after her marriage the said annuity of 40*l.* shall be and is hereby reduced to 20*l.* only, which said sum of 20*l.* shall in such case be paid and payable unto the said Eliza Castle from the time of her marriage, for and during all the remainder of her life, and any thing hereinbefore contained to the contrary notwithstanding."

The Master allowed her claim to an annuity of 40*l.* ; but his decision was reversed by the Vice-Chancellor of England on the ground that the proviso for reducing the annuity was illegal and void, as a restraint on marriage.

This was an appeal from that decision.

[*702] Mr. *Bacon* and Mr. *Montagu* appeared for the appellant.

Mr. *Spence* and Mr. *Winstanley* for the respondent.

In addition to the cases mentioned in the judgment, the following authorities were also cited :

Low v. Peers,^(a) *Long v. Denis*,^(b) *Morley v. Renoldson*,^(c) *Scott v. Tyler*,^(d) *Harvey v. Aston*,^(e) *Hartley v. Rice*,^(g) *Perry v. Lynn*,^(h) 5 *Vin. Abr.* 95 pl. 14., *Shepherd's Touchst.* p. 132. *Brooke v. Spong*.⁽ⁱ⁾

THE LORD CHANCELLOR.—I am of opinion that in this case the report of the Master was right. The question turns upon the construction of the covenant ; for there really cannot be any doubt as to the rule of law.

The questions which have arisen as to conditions subsequent in restraint of marrying do not appear to me to apply. There

(a) 4 *Burr.* 2225.

(d) 2 *Dick.* 722.

(h) 9 *East*, 181.

(b) *Ibid.* 2052.

(e) *Comyn*, 726.

(i) 15 *Moss. & Wels.* 153.

(c) 2 *Hare*, 570.

(g) 10 *East*, 22.

can be no doubt that marriage may be made the ground of a limitation ceasing or commencing. It is unnecessary to refer to authorities for this purpose. *Richards v. Baker*,^(a) *Sheffield v. Lord Orrery*,^(b) *Gordon v. Adolphus*,^(c) were cited in the argument. If, then, this grant is a grant of 40*l.* per annum until marriage, and, from that event happening, of 20*l.* per annum for life, there can be no doubt but that such a gift is lawful, and that after marriage there *can be no demand for the [*703] 40*l.* per annum. The claim is grounded upon contract and obligation on the part of the grantor: the parties claiming must therefore prove that their claim is within the terms of the contract and obligation. What, then, are these terms? [His Lordship then stated the covenant and proceeded:] Is there in this any contract or obligation to pay 40*l.* per annum after the marriage of Eliza Castle? The argument in favor of the claim assumes that there is an unqualified grant of an annuity of 40*l.* per annum for life, and an attempt to defeat the gift by an illegal condition subsequent. This proposition, I think, fails in all its parts, for there is not any unqualified gift of an annuity of 40*l.* for life: the contract and obligation is to pay to Eliza Castle during her life, subject to the proviso hereinafter contained, an annuity of 40*l.* at certain times specified. The contract and obligation is not absolute and unqualified, but explained, qualified, and bound by the proviso, and must be construed precisely in the same manner as if the terms of the proviso had been introduced into and made part of the contract and obligation. It is, therefore, to pay 40*l.* per annum to her during so much of her life as she shall remain unmarried, which brings the case within the unquestioned rule of law as acted upon in the cases referred to. One of them, indeed—*Sheffield v. Lord Orrery*—is upon this point stronger than the present, for there was a gift for life, without any qualification in the terms of the grant, but a subsequent condition giving the property over in the event of marriage; and Lord Hardwicke said that the gift over was to take effect on the marriage.

There is another way in which this may be viewed, equally fatal to the claim. The contract and obligation *is [*704]

(a) 2 Atkins, 321.

(b) 3 Atkins, 282.

(c) 3 Bro. P. C. 306.

 1848.—Webb v. Grace.

to pay a certain sum at certain stipulated periods during the life of Eliza Castle : but she is, by the proviso, at each of those periods to be qualified to receive it by the fact of not being married. Can she claim any of such payments though disqualified by the fact of marriage? The condition, therefore, if there be one, is precedent, and not subsequent.

I am, therefore, of opinion that the Master's finding was right, and that the report must be confirmed.

[*705]

*BAINBRIDGE v. BADDELEY.

1847 : November 13.

A bill of review, or a supplemental bill in the nature of a bill of review, is necessary where the title or subject-matter of the claim has been directly adjudicated upon in a former suit by a decree declaring or assuming a right or, in the case of a dismissal of a bill, negating it : but an order of dismissal is a bar only when the court has thereby determined that the plaintiff has no title to the relief sought by the bill, and, therefore, the dismissal of so much of a bill as relates to an issue raised by it which is irrelevant to the relief prayed, is no bar to a new bill by the same party for a different object depending upon the same issue.

The proper test by which to try whether a bill, which recites a decree and proceedings in a former suit, is, in reference to such a decree, to be considered a supplemental bill in the nature of a bill of review, is to see whether, if such decree and proceedings were omitted from the bill, they could be effectually pleaded in bar to it : for which purpose it is not sufficient that the plaintiff's claim in the second suit depends upon a determination of some issue at variance with the determination of the same issue in the former suit, unless such issue be relevant to the objects of both suits, and be raised between the parties in the same rights and in reference to the same subject-matter of claim.

A purchaser, from the trustees under a will of 1818, of part of the devised estates filed a bill against the trustees and the parties beneficially interested, suggesting that the will had been obtained by fraud, and was invalid, but praying no relief on that supposition, but only that the validity of the will might be inquired into, and that, if it should be found to be valid, the contract might be specifically performed. At the hearing, the bill was dismissed as against all the defendants, except the trustees, and that part of it which went to impeach the will was dismissed as against the trustees also, and the usual reference was directed as to title, and the Master having reported in favor of the title, a decree was ultimately made for specific performance. Some years after, the same plaintiff filed another bill against the parties in possession of the rest of the estates under the will of 1818, reciting the former decree and proceedings ; but charging that the will of 1818 had been obtained

 1847.—*Bainbrigge v. Baddeley*.

by fraud and when the testator was incompetent, and praying that it might be set aside, and that the plaintiff might be declared entitled to the estates under a limitation in a prior will of 1815, under which, supposing the will of 1818 to be invalid, his title had just accrued. Held (reversing the decision below) that the decree and proceedings in the former suit were no bar to the institution of the second, on the ground, 1st. That the issue raised by the first suit as to the validity of the will of 1818 was not relevant to the object of that suit: 2dly. That the two suits were not brought by the plaintiff in the same right, or 3dly, for the same subject-matter of claim.

THIS was an appeal from an order of the Master of the Rolls, allowing a general demurrer to the bill on the ground of its being, in reference to a former decree which was recited in it, a supplemental bill in the nature of a bill of review, and having been filed without leave of the court.

*The material substance of the bill, which was ex- [*706]
tremely involved and voluminous, is fully stated in the
Lord Chancellor's judgment.

Mr. Bethell and *Mr. Webster* appeared for the appellant.

Mr. Rolt and *Mr. Prior* for the respondent.

THE LORD CHANCELLOR.—The facts of this case are very concisely and very clearly stated in the judgment of the Master of the Rolls; (a) but, for the purpose of making intelligible the grounds upon which I am about to decide it, they may be stated in very few words:—

The testator made a will in 1815, under which the estates were limited to Mary Ann Bainbrigge for life, with remainder to her sons and daughters in tail, remainder to the plaintiff in tail. In 1818 he made another will, as it is alleged, under which, if valid, Mary Ann Bainbrigge and her children would take the same interest as under that of 1815; but the plaintiff was altogether excluded. Upon the testator's death in 1818, the will of that date was acted upon, and, there having been two children of Mary Ann Bainbrigge, the survivor of them did not die until 14th July 1845. Under both wills the estates would be in trust;

(a) See 9 Beavan, 522.

1847.—*Bainbrigge v. Baddeley*.

and the question as to which of these wills ought to prevail could only be agitated by the plaintiff in a court of equity ; and it is not in dispute that the present bill is sufficient for that purpose, were it not that it contains a narrative of certain transactions which, it is alleged, renders it open to a general demurrer ; [*707] which narrative is, in substance, *that the heir of law of the testator, who was the plaintiff's father, having disputed the validity of the will of 1818, an arrangement took place between him and the trustees of that will, under which he, by deed, confirmed that will ; and the trustees agreed to sell to him for a valuable consideration a dwelling house and certain premises, part of the estate, which he afterwards agreed, for a valuable consideration, to sell to the plaintiff, and to assign to him the benefit of the contract with the trustees of the will of 1818, who, nevertheless, brought an ejectment for the purpose of recovering the possession of these premises ; whereupon the plaintiff filed a bill against them for a specific performance of the contract, which was decreed, and, upon the usual reference, the title was found to be good, no objection, as the present bill alleges, having been made to the title of the trustees, the vendors ; and the report was confirmed, all which took place before the plaintiff's title accrued by the death of the survivor of the tenants in tail in 1845.

If that suit had been confined to what I have now stated, it would not have been contended that the proceedings which have taken place raised any impediment to the relief sought by the plaintiff in the present suit. But that bill was framed in a very extraordinary manner ; for it alleged that the will of 1818 had been obtained by fraud, and that the alleged testator was at the time incompetent, and that the deeds of confirmation by the heir at law had also been obtained by fraud ; and, making parties the persons who claimed under the will of 1818, it prayed an injunction against the ejectment, and that proper directions might be given for ascertaining the validity of the will of 1818 ; and, in case it should be found valid, then for a specific performance of the agreement. All this part of the bill was at the hearing properly dismissed ; and that dismissal, it is [*708] contended *in support of the demurrer, precludes the plaintiff from proceeding with his present bill. That

 1848.—*Bainbrigge v. Baddeley*.

bill alleges that the sole object of introducing that matter into the bill for a specific performance was to try the title of the vendors; and such appears to me to be the fact: for although the bill put in issue the validity of the will of 1818, it prayed no relief contingent upon the event of the will being found invalid, out only upon the contingency of its being found valid; and, indeed, the bill stated no title in the plaintiff except under the contract—no other connection with the property, if the will were invalid. No mention was made of the will of 1815; and even if the question had been between the devisees of the will of 1818 and the heir at law, the issue tendered would have been immaterial and irrelevant, the plaintiff having a contract binding upon both the heir and the devisees. The Master of the Rolls, in giving judgment, says that the finding a good title in the former suit would be inconsistent with a decree in conformity with the prayer of the present bill: that he was far from thinking that the proceedings in the former suit were inconsistent with the plaintiff's title to relief upon another proper bill, but he thought that, after the former proceedings, his bill for such relief as he now asks, ought not to be filed without the leave of the court; by which I understand his Lordship to mean that the former proceedings, so long as they stood, and until they were set aside by a supplemental bill in the nature of a bill of review, constituted a bar to the relief prayed by the present bill, because for that purpose only would the leave of the court be required for filing a new bill.

A bill of review, or a supplemental bill in the nature of a bill of review, is indeed necessary when the title or subject-matter of the claim has been directly adjudicated upon in a former suit by a decree declaring *or assuming a right, or [*709] negating it in the case of a dismissal of a bill; and the question to be considered is whether, if the bill had been silent as to those former proceedings, they could have been pleaded in bar to the present bill. For this purpose the plea must have averred that the former suit was for the same matter: *Davies v. Lord Brownlow*.(a) So the reference to the

(a) *Dick*. 611.

 1848.—*Bainbrigge v. Baddelley*.

Master, in such cases, is to inquire whether the suits were for the same matter. That the same matter was in issue in both suits for different purposes will not support the averment, for, if it could, the dismissal of a bill for one year's tithes upon the supposed want of title in the rector might be pleaded to a bill for the tithes of another year, as in both the title of the rector would be in issue: but that could not be: *Minor Canons of St. Paul's v. Crickett*.^(a) It is impossible to hold that the two suits in the present case were for the same matter. In the first the validity of the will of 1818 was, in fact, put in issue; but it was no part of the object of the bill to set it aside for fraud. The plaintiff had not at that time any title to raise such a question, or ask such relief. His title, as it existed and as it was alleged, was only under the contract; and the only object he could have had in the statement as to the will was to raise a question as to the title. His interest under the will of 1815 was only as heir in tail, after two prior estates tail, and even this was not alleged in the bill; but in the present bill his title rests entirely upon the will of 1815, the prior estates tail having determined; and the object of the suit is to set aside the will of 1818; and this opens another objection to the supposed plea—that the plaintiff's claim is not in the same right; *Huggins v. York Building Company*,^(b) which was carrying the doctrine very far: Lord Redesdale, however, adopts that case,^(c) and [710] explains it by saying that the first suit was wholly irregular; and nothing could be more irregular than all that part of the former suit in this case which related to the will of 1818. And this, again, opens another objection to the supposed plea—that the validity of that will was not, and could not have been, decided in that suit. The contract binding both the trustees and the heir who had confirmed the will, and who alone, according to those proceedings, could ever have disputed it (the will of 1815 not having been brought forward, the validity of the will of 1818 could not have been matter of decision, and the bill as to that must have been dismissed, because the issue had been improperly raised and did not affect the question

(a) Wightw. 30.

(b) 2 Atk. 44.

(c) Redesd. Pl. p. 202, 3d ed.

 1848.—*Bainbridge v. Baddoley.*

in dispute between the parties. An order of dismissal is a bar only where the court has thereby determined that the plaintiff had no title to the relief sought by his bill.^(a) If the court did intend to decide upon the merits as to that part of the case, it was clearly an error and irregularity; it was an issue which could not affect the decree to be pronounced between the parties, and therefore the decree could not be a bar: *Behrens v. Stevking*.^(b)

If the proceedings in the former suit as they are stated in the present bill could not, if they had not been so stated, have supported a plea, they cannot, when stated, support a demurrer; and if they form no bar to the present bill, this suit may proceed without any necessity for reversing the former decree; and no new bill, and consequently no leave of the court, is necessary for the purpose. I am, therefore, of opinion that the general demurrer to this bill cannot be supported. [His Lordship then adverted to an objection for want of proper parties to which he thought no sufficient answer had been given, and he therefore, allowed the demurrer on that ground, but with the usual leave to amend.]

 *TOULMIN v. COPLAND.

[*711]

1848: August.

A bill by the representative of a deceased partner against the surviving partner, for an account of the partnership dealings and transactions, contained an allegation that the defendant had employed and intended to employ the assets of the late partnership in carrying on the business on his own account, but prayed no relief in respect of such allegation, and the decree merely directed the ordinary partnership accounts, reserving further directions. But on the death of the defendant some years afterwards, and before the Master had made his report under the decree, the same plaintiff filed a bill of revivor and supplement against the representatives of the late defendant, repeating the allegation above-mentioned as to the employment of the partnership funds, and praying an account of the profits made thereby, in addition to the usual prayer for carrying on the accounts directed by the former

 (a) Redd. Pl. 194, 3d ed.

(b) 2 Myl. & Cr. 602.

 1848 --Toulmin v. Copland.

decree. Held (reversing the decision below) that such bill was not, in reference to the decree in the original suit, a supplemental bill in the nature of a bill of review, the new relief founded upon the allegation above-mentioned not being inconsistent with that decree, but so far from it, that the accounts directed by the decree were necessary to raise the case for such new relief, and must have been directed, if both claims had been united in one suit.

The question in such cases turns upon the matter of the decree, and not upon allegations in the original bill to which the decree does not apply.

THIS was a motion to discharge an order of Vice-Chancellor Wigram, by which it was ordered that a bill of revivor and supplement should be taken off the file, as being, in reference to the decree, pronounced in the original suit, and which was recited in it, a supplemental bill in the nature of a bill of review, and having been filed without leave of the court.(a)

The original bill, which was filed on the 16th January 1819, stated that Abraham Toulmin, deceased, and the defendant Copland had carried on business in partnership under a verbal agreement, as Navy agents, from the year 1811 until the death of Abraham Toulmin, which took place on the 4th January 1819, (twelve days before the filing of the bill,) up to which time no accounts had been taken of the partnership dealings and transactions; but that by far the greater part of the capital with which the business had been carried on was furnished by

Abraham Toulmin and that a large sum was due from [712] the *partnership to the plaintiffs as his personal representatives. The same bill also alleged that the defendant had, since the death of his late partner, employed the partnership assets in carrying on the same business on his own account, and that he intended to continue so to do. And it prayed the usual accounts of the dealings and transactions of the late partnership, and payment of what should be found due to the plaintiffs as the personal representatives of Abraham Toulmin. It also prayed the appointment of a receiver to collect the outstanding partnership debts, and an injunction to restrain the defendant from selling out certain stock then standing in the joint names of himself and his late partner, and which the bill alleged to be partnership property; but it prayed no relief in respect of

(a) See 4 Hare, 41.

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the alleged employment of the partnership funds by the defendant in his own transactions.

The prosecution of the suit having been interrupted by several ineffectual attempts at a compromise, the cause did not come on for hearing until the year 1829, when a decree was made, by which certain inquiries were directed as to the terms of the partnership agreement, which were the principal matter in dispute upon the pleadings; and it was ordered that the accounts of the partnership dealings and transactions should be taken according to the result of those inquiries, and further directions and costs were reserved. That decree and the proceedings under it in the Master's office were the subject of various appeals, which greatly delayed and protracted the taking of the accounts. In the year 1843, and before the Master had made his general report, the defendant Copland died: whereupon the bill now in question was filed against his daughters as his personal representatives and the general devisees of his real estate. After stating the previous proceedings in the cause and the death of Copland, it *alleged, by way of supplement, that ever since [*713] the death of Abraham Toulmin, Copland had carried on the business of a navy agent on his own account, and in so doing had employed the assets of the late partnership, although such assets were, as the bill charged, wholly, or for the most part, the property of the plaintiffs as the representatives of Abraham Toulmin: in support of which general charge the bill contained divers specific charges purporting to be evidenced by the accounts so far as they had then been taken in the Master's office; and, after charging that Copland had made great profits by such employment of the plaintiff's monies, the bill prayed that the suit might be revived against the new defendants, that the accounts directed by the former decree might be carried on and prosecuted against them, and that an account might also be taken of the profits made by Copland since the death of Abraham Toulmin with the balances from time to time in his hands belonging to the partnership; and that it might be declared that the plaintiffs were entitled at their option, either to participate in such profits, or to be allowed interest at 5 per cent. upon their testator's share in such balances; and that what should appear

1848.—*Toulmin v. Copland*.

to be due to them as such representatives on both accounts, might be paid, in a due course of administration, out of the personal estate of Copland, and if that should be insufficient, then by sale of his real estates.

On the hearing of the appeal motion,

Sir *Francis Simpinson*, and Mr. *T. J. Phillipps* appeared for the plaintiff.

Mr. *Bethell*, Mr. *Rolt*, and Mr. *Kenyon*, contra.

In support of the Vice-Chancellor's order, it was argued [714] that, as the new account of profits prayed by the "bill in question was founded on matter which was put in issue by the original bill, but in respect of which no relief was expressly reserved by the decree, such account was inconsistent with the decree, inasmuch as it would result in a species of relief different from that to which the plaintiffs would otherwise be entitled on further directions, under the reservation actually contained in the decree; *Hodson v. Ball*,^(a) *Davis v. Bluck*,^(b) *Garland v. Littlewood*.^(c)

On the other hand it was observed that *Hodson v. Ball* was decided expressly on the ground that the relief prayed by the supplemental bill was inconsistent with the decree actually made in the original suit, whereas here the only inconsistency that could be suggested was between the relief now asked and that which, if the supplemental case had not been brought forward, the plaintiff would have been entitled to ask at some future stage of the original suit. It was, however, further contended, that, even supposing the argument on the other side were good to any extent, it could only apply to the interval of twelve days between the death of Abraham Toulmin and the filing of the original bill, and not to any subsequent application of partnership assets during the twenty years which followed; every individual instance of such application constituting a distinct ground

(a) 1 Phill 177.

(b) 6 Beav. 393.

(c) 1 Beav. 527.

1848.—*Toulmin v. Copland*.

of complaint, and being capable at the option of the plaintiff, of being made the starting point of the new account. So that if, instead of the objection having been taken by a motion to take the bill off the file, the supplemental cause had gone to a hearing, as in *Hiern v. Mill*,^(a) the utmost effect that could have been given to the objection would have been to limit the account to the misapplication of *partnership monies [*715] subsequent to the filing of the original bill. That that circumstance of itself threw a doubt upon the propriety of this mode of raising the objection; there being, it was believed, no instance of it in a case where the objection even if tenable, went only to a part of the relief prayed, except the recent case of *Hodson v. Ball*; and the practice in cases where the objection went to the whole bill (*Davis v. Bluck*,) having probably crept in from its equivalence to the more common and regular remedy by demurrer.^(b)

THE LORD CHANCELLOR.—Many of the observations which I made in giving judgment in *Bainbrigge v. Baddeley* on 13th November last, apply to the present case; for in this case the question is, whether the decree upon the first bill is so inconsistent with what is asked by the present bill as to be a bar to the relief thereby prayed, until reversed upon a bill in the nature of a supplemental bill of review and upon an accompanying rehearing.

The decree directs an account of the transactions of the partnership which terminated by the death of one of the partners, the bill having been filed twelve days after such dissolution. The present bill prays for an account and payment of the profits alleged to have been received by the surviving partner from the improper use of the deceased partner's share of the partnership property which came to the hands of the survivor.

This bill has been ordered to be taken off the file upon the declared ground that such a bill, after such a decree, was in substance in the nature of a supplemental bill of review, and could not be filed without the leave of the court.

(a) 13 Ves. 114.

(b) See *Bainbrigge v. Baddeley*, ante, p. 704.

1848.—Toulmin v. Copland.

[*716] *If this question be tried by the test referred to in the case of *Bainbrigge v. Baddeley*, it will, I think, appear plainly that the order cannot be supported upon that ground. The former decree could not be pleaded in bar to the new bill; the same matter was not in issue in the former suit within the meaning of the term as there explained: so far from it indeed, that the accounts directed by the decree are necessary to raise the case made by the bill, and must have been directed if both claims had been united in one suit, and, if so, there cannot be any necessity for removing the decree out of the way before the relief prayed by the bill can be granted, and therefore it is not a case of a supplemental bill in the nature of a bill of review.

There is another test by which this bill may be tried, differing in form, but not perhaps in substance, from the former. If application had been made for leave to file a supplemental bill in the nature of a bill of review, what would have been the case made for that purpose? not the discovery of new matter which had arisen after the decree, or new proof come to light after the decree, and which could not possibly have been used at the time; all which refers to the matters in issue in the cause. In this case the ground of the relief prayed was the death of one of the partners; and the use made of his share of the partnership property by the survivor relates to transactions subsequent to the dissolution of the partnership by the death of one of the partners, and is not inconsistent with, but consequent upon, the result of the partnership accounts directed to be taken by the decree.

As I observed in *Bainbrigge v. Baddeley*, the alleging matters in the former suit which were not and could not be the subject of the decree, cannot interfere with the founding a [*717] new suit upon such matters after the decree. *The question is as to the matters of the decree, and not as to the statements in the bill to which the decree does not apply.

I am, for these reasons, of opinion that the bill in question is not irregular; and that the leave of the court was not required for filing it, and consequently that the order was erroneous, and

1848.—*Toulmin v. Copland*.

must be discharged, and the plaintiff must have the costs of the motion below.

MOORE v. GREG and others.

1848: November 4, 7.

An equitable mortgagee, by deposit, of a lease is not compellable in equity, at the suit of the lessor, to take a legal assignment of the lease, although he may have entered into possession of the premises and paid rent. Nor, *semble*, is he liable to the lessor upon the covenants, there being no privity between him and the lessor until he has made himself legal assignee. *Lucas v. Comerford* (3 B. C. C. 166,) overruled.

THIS was an appeal from an order of the Vice-Chancellor of England, allowing a general demurrer to the bill for want of equity.

The bill stated that, by an indenture dated the 12th of May, 1842, the plaintiff demised to the defendant Taylor a cotton mill or factory, with the engines and machinery therein, a great part of which was affixed to the freehold for a term of twenty-one years at a certain rent, payable half yearly on the 12th of May and the 12th of November in each year. That the indenture was shortly afterwards deposited by Taylor with the defendants the Messrs. Greg, as a security for the floating balance of an account for monies advanced and cotton furnished by them to Taylor for the purposes of his trade. That on the 12th of November 1846, there being a large amount of rent then due to them from Taylor, the plaintiffs levied a distress on the demised premises, which was replevied by Taylor; one of the partners, and a clerk, in the firm of the Messrs. Greg, joining in the replevy bond. That a few days afterwards the plaintiff having discovered, that, owing to a mistake, the sum for *which the [*718] distress had been issued was less than the amount of rent actually due, caused another distress to be made for 100*l.*, and that, in order to remove such distress, the Gregs paid that sum to the sheriff's officer, and, with the consent of Taylor, took possession of the premises themselves. That, in November 1847,

 1848.—*Moore v. Greg.*

the Gregs put an end to the action of replevin by paying the whole amount of rent claimed, up to that time, with costs; and that, in March, 1848, after some fruitless attempts to find a person who would purchase the machinery and take an assignment of the lease, they sold a considerable portion of the machinery, including part of that which was affixed to the freehold. That ever since they took possession of the premises, as before mentioned, they had continued, by an agent, in the exclusive occupation thereof, until shortly before the filing of the bill, when, in order to relieve themselves from liability to the plaintiff for the future payment of rent and performance of the covenants in the lease, they redelivered to Taylor the indenture of the lease, and reinstated him in the possession of the premises. But the bill charged that, by taking possession of the premises and dealing with them as they had done, the defendants, the Gregs, "had conducted themselves towards the plaintiff as assignees of the lease, and that the plaintiff had accepted them as such assignees, and that they ought not to be allowed, by abandoning the possession, to escape from the liability attaching to that character." And the bill prayed that it might be declared that the Gregs were liable to the rent and to the covenants of the lease, and that they were bound to accept, and the defendant Taylor to execute to them, a legal assignment of the premises for the residue of the term; and that the defendants Taylor and the Gregs should respectively be decreed to execute and accept such assignment accordingly.

[719] "The demurring defendants were the Messrs. Greg.
On the hearing of the appeal,

Mr. *Rolt* and Mr. *Webster* appeared for the appellants.

Mr. *R. Palmer*, for the respondents.

The following cases were referred to: *Lucas v. Comerford*,^(a)
Flight v. Bentley,^(b) *Moore v. Choat*,^(c) *Jenkins v. Portman*,^(d)

(a) 3 B. C. C. 166, 1 Ves. 235, and 8 Sim. 499.

(b) 7 Sim. 149.

(c) 8 Sim. 508.

(d) 1 Keene, 435.

1848.—*Moore v. Greg.*

Closs v. Wilberforce,(a) *Wilson v. Leonard*,(b) *Sandys v. Benson*,(c) *Marsh v. Brace*,(d) *Williams v. Bosanquet*.(e)

Nov. 7.—THE LORD CHANCELLOR.—In this case the question is whether the bill states grounds for the equitable interposition of this court? The case made by the bill is that the plaintiff, being entitled to property, made a lease of it, and that the party to whom that lease was made, afterwards deposited it with the present defendants as a security for a sum of money: that the rent being in arrear, the owner of the estate distrained; that the distress was replevied; but that the amount of the rent then due, together with a further sum which became due subsequently to the distress, was ultimately paid by these defendants, the depositaries of the lease. It is stated that at the time when the distress was levied, the lessee was himself in possession, but that subsequently the premises were found to be in the hands of those who had the deposit *of the lease. It [*720] appears, however, that when the bill was filed no rent was due, the arrangement by which the action of replevin had been put an end to having cleared off the rent up to some day in November 1847, and the bill having been filed before the expiration of the next half year: in fact, it is not alleged in the bill that any rent was due; nor does the bill pray the payment of any arrears of rent or the performance of any of the covenants in the lease, but it prays a declaration that the defendants, the depositaries of the lease, were liable prospectively to the rents reserved by it. And then it prays that they may be decreed to accept, and the lessee to execute an assignment of the lease.

It appears, therefore, on the face of the bill, that the whole connection of these defendants with the property, or with the plaintiff, was that they had taken a deposit of the lease by way of security for a sum of money. It is true that possession is alleged. But the bill asks no relief in respect of such possession: it does not call for an execution or performance of any of the covenants of the lease: nor does it allege that at this moment

(a) 1 Beav. 112. (b) 3 Beav. 373. (c) 4 Beav. 350. (d) Cro. Jac. 334.
(e) 1 Bead. & Bing. 238.

there is any breach of any of those covenants. It only prays prospectively, that the defendants may be declared liable to the covenants, and that they may take and execute an assignment of the lease. No doubt, if that were decreed, they would hereafter become liable at law upon the covenants, for they would then become assignees of the lease. But the question immediately occurs, Why should a court of equity interfere to compel a party, whose only connection with the property is that he has taken a piece of parchment from the lessee as security for a debt, to put himself in a totally different situation from that which he intended,—namely, to clothe himself with a legal liability to the covenants by taking an assignment to the lease?

[*721] One thing is certain, that if this court *were to administer such relief, it would effectually prevent anybody from ever hereafter taking a deposit of a lease as a security for a sum of money, for no man in his senses would take a deposit of a lease if he were thereby to render himself liable to the covenants of the lease. Such a depositary has no connection with the property but a right to hold the document deposited, for the purpose of securing the debt. What right such a deposit may give him as against the person who makes it, whether a right to sell the interest of that party in the property, or a right to an assignment of such interest is a matter which at present I do not feel it necessary to consider: because, however that may be, I cannot understand what right the lessor has to call upon a court of equity to put the mere depositary of the lease, who has no privity with him by contract or otherwise, in a totally different situation from that in which he intended to place himself by his contract with a third party.

This is not even the case of a party, who has contracted for an assignment of a lease, being called upon in equity to fulfil the covenants of the lease as he would be bound at law to do if the assignment had been actually executed. It would be difficult enough to enforce such an equity if that case were to arise; but that is not the object of the present bill. There are no covenants broken, no relief prayed on any of the covenants contained in the lease. The object is to compel a party holding a lease by way of deposit to make himself the legal assignee.

1848.—*Moore v. Grog.*

What would that be but for equity, instead of following the law which is the usual rule, to run before the law? Indeed it was hardly argued that the mere taking a deposit of a lease would create such a liability but it was said that there was in this case something more; that the defendants had been in possession, and had paid the rent due from the party from whom they *took the deposit. But is that to make them [*722] liable to the covenants which the lessee had entered into? A lessee is liable to a distress from his landlord, and the goods being distrained, some other person from interested motives, or motives of friendship, comes in and pays the demand of the landlord, taking no assignment nor any security beyond what he had before. That, of course cannot make him liable to any of the covenants in the lease. He pays the money for or on behalf of the party who owed it. Well, then, does his being in possession make him liable? If that were so, there would be an end of the distinction between an assignment of a lease and an underlease. Taking an underlease does not render you liable to all the covenants in the original lease, but taking an assignment does; which shows that the effect of possession depends upon the title under which it is taken, and that mere possession not taken under a title can go for nothing.

There are, then, in this case three things which are alleged as constituting the liability,—the being the depositary, the having paid the rent, and the having been in possession. Now none of these things taken separately will make the party liable upon the covenants of the lease, and if none of them separately will, it is very difficult by reasoning to show why they jointly should have that effect. If the question, therefore, had stood unaffected by authority, I should not have had the least doubt but that the relief sought by this bill was one which this court would, upon its ordinary principles, refuse. But I am told that in a case of *Lucas v. Comerford*,^(a) Lord Thurlow did administer that very relief; and I cannot but say that, unless there is *something still behind in that case which has not yet [*723] been discovered, it is a decision by Lord Thurlow that a party, having an equitable interest in a lease, is liable in a court

(a) 3 Bl. C. C. 166

 1848.—*Moore v. Greg.*

of equity, at the suit, not of the party with whom he is dealing, but of the original landlord, to be compelled to take a legal assignment of the term : and no doubt a deliberate decision of that sort by such a judge as Lord Thurlow, if it had been sanctioned by practice following upon it, would have been an authority which I should not have been at liberty to overrule, however much it might have appeared to me at variance with the ordinary principles upon which justice is administered in this court. It seems, however, from the report of that case, that singular as it may appear, the point was not very directly raised before Lord Thurlow. The case was this ; there was a covenant in the original lease that at a certain period of the lease the lessee should rebuild the house. The lessee before this covenant was performed, indeed before the time at which it ought to have been performed, deposited the lease as a security with another person. The question was, whether the person so holding the lease was bound by the covenant. The bill was filed, not, as here, to compel the defendant to take a legal assignment of the lease, but directly to enforce the specific performance of the covenant. And it appears that the defendant rested his case upon the rule that this court would not enforce a covenant to rebuild ; and so Lord Thurlow thought, and said that he could not by decree direct a party to perform a covenant of that description but added, that what he could do he would,—viz. compel the defendant to take a legal assignment of the term, and so render himself liable at law. That was undoubtedly the relief which Lord Thurlow thought it right to give : but the question, whether it was such relief as a court of equity was justified in giving against such a *defendant, does not seem to have been raised in argument, and was probably not much considered.

Several cases involving the same question have since occurred in which that case has been referred to ; but no case has been mentioned in which Lord Thornton's doctrine has been adopted, except *Flight v. Bentley*, in which the Vice-Chancellor made a decree—not, indeed, exactly such as Lord Thurlow made, or such as is asked by this bill,—giving effect to the covenants of the lease against the deposites, on the principle, that they were

1848.—*Moore v. Greg.*

in equity binding upon him ; but in the very next volume of the same reports there is a case of *Moore v. Choat*, where the bill prayed precisely the same relief as that in *Flight v. Bentley*, viz. performance of the covenants, and, if necessary, an execution of the assignment, in which the Vice-Chancellor, on having his attention called to his own decree in *Flight v. Bentley*, disclaimed the doctrine on which it was founded, and expressed his surprise that such a decree should ever have been made. The only observation I make on what then fell from the Vice-Chancellor is, that I cannot concur in the opinion, which he seems to have entertained, that he could decide that case of *Moore v. Choat* as he did consistently with the case of *Lucas v. Comerford* ; for I confess I cannot see any ground of distinction between the two cases ; inasmuch as both of them turned upon the question whether an owner of an estate can or cannot treat a party who has only an equitable title to the lease, derived from the leasee, in the same way as if he had a legal title. However, in that case the Vice-Chancellor expressed a very clear opinion that there had been an error in the decree in *Flight v. Bentley* ; and he established the doctrine that no privity exists between parties in those respective situations.

*The case of *Close v. Wilberforce* before the Master [*725] of the Rolls, which was also referred to, was of a totally different kind, being a case between a lessee and an equitable assignee of the lease, the former calling upon the latter, who had been for many years in possession of the property as purchaser, to indemnify him against a claim by the lessor for dilapidations and breaches of the covenants in the lease. In that case it is clear that a privity existed between the plaintiff and defendant, and, therefore, whatever the merits of it might be, it could not raise the present question, which is, whether a lessor has any equity upon the covenants against an assignee, there being no legal assignment of the term.

Such, then, being the state of the authorities, there being undoubtedly, in support of the present bill, a decree of Lord Thurlow, but which has never been followed except in the single case of *Flight v. Bentley*, the authority of which was distinctly repudiated by the judge who decided it in the subsequent case of

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Moore v. Choat, the question is whether I am bound to act on that decree of Lord Thurlow, objectionable as it appears to me in principle, as an established rule of equity. I am of opinion that I am not. The state of the authorities does not compel me to do so; and not being compelled, I will not make an order which would have the effect of again setting up that rule as the doctrine of the court.

I think, therefore, the decision of the Vice-Chancellor allowing the demurrer, was correct, and that the present appeal must be dismissed with costs.

[*726]

*RHEAM v. SMITH.

1848: December 13.

An individual shareholder in an insolvent joint-stock company, being sued at law by a banking firm consisting of five partners, one of whom was also a shareholder in the company, for a debt due from the company to the bank, filed a bill against the plaintiff at law, and all the other shareholders in the company, praying that the affairs of the company might be wound up, and that, in the mean time, the action might be stayed. A general demurrer by the other four partners in the bank was allowed, on the ground that the relief prayed necessarily involved the winding up of the affairs of the bank as well as of the company, which, if it had been specifically prayed, which it was not, would have rendered the bill multifarious.

But semble. This court will not restrain a creditor of a joint stock company from enforcing payment of his debt against an individual shareholder, on the ground merely that the creditor is himself a shareholder, and therefore liable to contribute, as such interference would defeat the rule at law, which, for convenience, enables creditors of such companies to recover their debts by that form of proceeding.

This was an appeal from an order of the Vice-Chancellor of England overruling a general demurrer to the bill.

The bill stated that, in 1836, a joint stock company was formed for the purpose of establishing a proprietary school, called the Hull College, in shares of 25*l.* each, limited in number to 200; and that the plaintiff and upwards of 100 other persons, all of whom were defendants, subscribed and became shareholders in the company. That the undertaking, proving unsuccessful, was abandoned in the year 1845; but that various debts which were

1848.—*Rheam v. Smith.*

contracted in the course of carrying it on still remained unpaid. That, though there were some assets of the company still outstanding, such assets were inadequate to the payment of the debts, and that the plaintiff was only liable to such debts jointly with the other shareholders. That the defendant John Henry Smith and five other persons (who were the demurring defendants,) being in partnership as bankers, had lately brought an action against the plaintiff in the Court of Exchequer to recover 1020*l.* alleged to have been advanced by the bank to the company; but that John Henry Smith was also a shareholder in the joint-stock "company; and that, if an account were [*727] taken of the affairs of the company, it would be found that, as between himself and other shareholders, including the plaintiff, John Henry Smith was equally liable with the plaintiff to the payment of a portion of the said alleged debt; and that the portion of it for which the plaintiff was liable, as between himself and the other shareholders, did not exceed 10*l.*

The bill then charged that, under these circumstances, it was contrary to equity that John Henry Smith should be allowed, either alone or jointly with his copartners, to enforce payment against the plaintiff of the debt; and it prayed that the accounts of the company might be taken, and its affairs wound up under the direction of the court: and that provision might be made for payment of the debts of the company, including the debt in question, and, so far as might be requisite for that purpose, by the contribution of the shareholders according to their relative liabilities; and that in the meantime the action and all proceedings therein might be stayed.

On the hearing of the appeal,

Mr. *Rolt* and Mr. *Roundell Palmer* appeared for the appellants.

Mr. *Stuart* and Mr. *Goodeve* for the respondent.

In the course of the argument it was stated that the Vice-Chancellor had treated the case as one in which a partnership composed of A. & B. were suing a partnership composed of A., C. & D. in which case he considered that it would be contrary to equity to allow the "debt to be recovered with. [*728]

1843.—*Rheam v. Smith*.

out first ascertaining for what proportion of it A. himself was personally liable.

THE LORD CHANCELLOR.—It really seems to me that if the principle upon which this demurrer is said to have been overruled by the Vice-Chancellor were admitted, it might lead to the most frightful consequences; for it comes to this—that if a railway company, or any company carrying on great works, and who may have become indebted to some contractor in half a million of money for work done, upon that contractor applying for payment of his debt, can find out that he or any one connected with him in business holds a single share in the company, they may say No, we cannot pay your debt; you must first break up the company, and ascertain whether its assets are sufficient for payment of its debts; for if not, you, or the persons connected with you, will be liable to contribute to the very sum which you seek to recover. It is impossible to stop short of that, if the principle be once admitted.

After some difficulty a rule has been established at law enabling creditors of these great companies to enforce their claims against individual shareholders, leaving them, of course, to their right to contribution against their copartners. The rule, no doubt, leads sometimes to hardship upon the party sued: but the balance of convenience is in its favor, and for that reason it has been adopted, because it would be a still greater hardship upon parties dealing with such companies if the enforcement of their claims were to be embarrassed by the necessity of treating all the members of the company as jointly responsible. This suit, however, is an attempt to induce a court of equity to interfere [*729] with that rule; *for the plaintiff by his bill asserts, in effect, nothing short of this proposition—If I can find out that you, who are suing me at law, have a single share in the company against whom the claim is made, then there is an end to your legal right: Equity will interfere, and, though your money may have contributed to the establishment of the company, you shall not be permitted to recover a single farthing against any member of the company until the concern is altogether wound up.

I have made these observations upon the general principle in-

volved in the bill, and which the order of the Vice-Chancellor appears to have recognized, on account of the alarming consequences to which it seems to lead : but they are not the grounds upon which I dispose of this case ; for, independently of these general considerations, there are other objections on the face of the bill which appear to me to be fatal to it.

Here is a bill filed by an individual who is sued at law for a debt due to a banking house. He says, you, the banking-firm, ought not to be permitted to sue me for this debt, because Mr. Smith, one of the partners in your firm, is a shareholder in the company ; and, therefore, if I am liable to pay this debt, he is bound to contribute with me to this and all other demands against the concern in which we are both shareholders. Now, as against Mr. Smith, in a suit properly framed for that purpose, the plaintiff may or may not be entitled to such contribution ; that is not the question here ; for, he says, because Smith, a partner in the bank, is also a shareholder in the company, you, the bank, shall not be permitted to sue ; and he makes, not only Smith, but all the other partners in the bank parties to the suit. But what is the equity against the partners ? If they are not to be permitted to proceed at law, what *is it that the plaintiff [730] asks against them ? If his contention is that they shall not be permitted to recover the debt at law, because one among them has a joint liability for it with the plaintiff in equity, what is that but to set off a joint against a separate debt ? If, on the other hand, the object is to set off the amount of Smith's liability, not against the whole debt claimed by the bank, but against the part which will be coming to him as one of the partners, the answer to that is twofold—1st. The bill contains no allegation that, if the accounts of the bank were taken, any thing would be coming to Smith. For aught that appears, he may be a debtor to the partnership, and then his share of the sum in question would be nothing. But, 2dly, if that be the object, the bill is multifarious in the highest degree. For, in order to work out that equity, it would be necessary to wind up the affairs of the bank as well as those of the company, in which the other partners in the bank have no interest or concern whatever. It is obvious that that is multifariousness in its highest possible form.

1848.—Rheam v. Smith.

Without, therefore, insisting upon the extremely dangerous consequences which I think would result from acting upon the doctrine which seems to be the foundation of the order of the Vice-Chancellor, it appears to me that upon these particular grounds the demurrer in this case ought certainly to have been allowed.

[*731]

*WHITTLE v. HENNING.

1848: December 24.

A fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by the three for payment of the fund to the son was refused, on the ground that this court will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control.

By the settlement made on the marriage of Mr. and Mrs. Henning in 1822, the sum of 2000*l.*, to which Mrs. Henning was entitled under her father's will, was vested in trustees in trust for the intended husband and wife successively for life, and, after the death of the survivor, on the usual trusts for the children of the marriage as the parents should appoint, &c. And the deed contained a power to the trustees, at the request of Mr. and Mrs. Henning, or the survivor of them, to invest the money in land, to be held on the same trusts as were thereby declared of the money.

This suit was afterwards instituted for the administration of the testator's estate, and the 2000*l.* was carried over in the cause, to the separate account of the marriage settlement.

By an indenture of the 1st of November 1847, Mr. and Mrs. Henning, by virtue of the power in the settlement, which was an exclusive one, appointed the fund, subject to their own lives, to John James Henning, their only surviving child. And by another indenture dated the 15th March 1848, and made between

 1848.—Whittle v. Henning.

the son of the first part, Mr. Henning, the father, of the second part, and Mrs. Henning of the third part, the father and the son released and surrendered their respective interests in the fund to Mrs. Henning, expressly "to the intent that the interests of the father and the son might be *merged and extin- [*732] guished in that of the mother, and that the fund might become absolutely vested in possession in her." And having executed that deed, the father, mother, and son presented a joint petition to the Master of the Rolls, praying that the fund in court might be transferred to the son. His Lordship having dismissed the petition, this was an appeal from his decision.

Mr. *Batten* appeared in support of the appeal petition, and cited several cases, all of which are reviewed on the Lord Chancellor's judgment.

Dec. 24.—THE LORD CHANCELLOR.—When this petition was heard, I expressed a strong opinion that the prayer could not be granted, and I had understood that the petitioners did not propose to press the case any further.(a) Having, however, lately been informed that they wished for my judgment upon it, I have fully considered the very important point raised by the petition; most important, as deeply affecting the protection which this court ought to afford to married women, and worthy of the utmost deliberation, as the Master of the Rolls and Vice-Chancellor of England entertain opposite opinions. The point is one which ought not to remain in that state; and I am glad of the opportunity of doing what in me lies to settle it.

It appears upon the petition that, by the marriage settlement of Mr. and Mrs. Henning, the sum in question, the property of the wife, was vested in trustees, upon trust *to [*733] pay the income to the husband for his life, and then to the wife for her life, and then to pay the principal to such child of the marriage, and in such manner as the parents should ap-

(a) Probably because the object of the petition might be indirectly attained by an investment of the fund in land, for which, it will be observed, there was a power in the settlement.

1848.—Whittle v. Henning.

point. An appointment of this sum was duly made in favor of the son of the marriage, and he had executed a deed assigning and releasing all this reversionary interest in the fund to his mother, her executors, administrators, and assigns, to the end that the life interest of the mother might merge in this reversionary interest of the son, and be enlarged thereby into an immediate absolute interest expectant on the death of the father, and the father assigned and surrendered all his interest in the fund to his wife, the mother, to the intent that such, his life interest, might be merged and extinguished in the interest of the wife, and that the fund should become absolutely vested in her.

The first thing which strikes the mind is, what effect this machinery can produce, and how it can alter the rights of the parties. The wife, by her marriage settlement, had an interest for her life in all the dividends which would accrue after the death of her husband, and before her own; and this, by the acknowledged law and practice of this court, was secured to her, as she could not part with it during the coverture. The husband had a right to all the dividends which should accrue during his life; but he could not by any means defeat or interfere with the future life interest of his wife. What, then, is the effect of his assigning this life interest of his for the benefit of his wife? Whatever benefit the wife could derive under this assignment must terminate with the coverture, it being for the life of the husband. To such interest the husband *jure mariti* would become immediately entitled; that is, his interest would remain the same, though under a different title. It [734] would indeed be strange if such a scheme should have the effect of enabling him to deprive the wife of her future life interest by depriving this court of the exercise of its jurisdiction for her protection. If that were possible, it would be difficult to suggest methods by which fathers could secure for the widowhood of their daughters that income which the fortune settled upon them might produce. All the rules of this court for the protection of married women are for their protection against the influence of their husbands when exercised for the purpose of appropriating to themselves property which the wives ought to enjoy, or against the too severe operation of the

 1848.—Whittle v. Henning.

marital rights. That the court disregards for this purpose what the abstract rights of the husband may be, is illustrated by the rule that this court will not assist the husband to possess himself of property to which he is entitled *jure mariti*, without securing so much of it as it thinks right for the benefit of the wife and children, and will enforce her equity against him, unless satisfied by the private examination of the wife that she fully understands her rights, and is desirous that the property should be paid to her husband. If the property be reversionary, the court will not take her consent, the principle of which rule is very clearly explained in the very able judgment of Sir Thomas Plumer in *Purdew v. Jackson*,^(a) and, as in that case, will not give any effect to an assignment by the husband and wife against the surviving wife. In *Stiffe v. Everitt*^(b) I expressed an opinion that the present life interest of the wife fell within the rule, because if she should survive her husband, all payment after his death would prove to have been reversionary within the principle of the rule. If that opinion be correct, it follows that, if, from the commencement, the wife had had a life interest in the dividends, such interest would *be inalien- [*735] able by the husband, except as to what might accrue during the coverture. But is not the position of the parties in the present case precisely the same? The husband in her right is entitled to all the dividends which may arise during the coverture, but upon his death her title to all future dividends during her own life will be her's. In neither case will the court permit the husband to deprive her of such reversionary interest. It is true that the wife in this case has not only a present life interest from her husband, but the ultimate interest in the fund from her son, and therefore, it is said, has a present absolute title to the whole. This proposition assumes that her reversionary life interest no longer exists; that it is, in fact, merged in the other interests so conferred upon her by her husband and son. But this can only prevail if the court should, by analogy to law, establish an equitable merger for the sole purpose of depriving the wife of this protection to her reversionary interest which it

(a) 1 Russ. 1.

(b) 1 M. & Cr. 37.

 1848.—Whittle v. Henning.

has hitherto afforded, which would be to permit a supposed analogy to the rules of law to defeat the rules and practice of this court in the protection it affords to married women, although in all other cases it disregards the rules of law and the rights of husbands when they interfere with such rules and practice. What this court protects is the reversionary life interest of the wife, and for that purpose it will consider it as still reversionary, notwithstanding other parties interested in the fund may for the purpose of depriving her of such reversionary interest, by enabling her to dispose of it, endeavor to unite in her person all the other interests in it. I observe that the Vice-Chancellor of England, in *Hall v. Hugonin*,^(a) says that he does not put the case as one of merger; but the conveyancer who prepared the assignment in this case seems "to have been aware that in no other way could the object of the parties be advanced, for it recites that the object was, that the life interest of the husband should be merged and extinguished in the interest of the wife. If there be no merger, the life interest of the wife remains reversionary, and would therefore be clearly within *Purdev v. Jackson*,^(a) *Honner v. Morton*,^(b) and the many other cases which have established the rule for the protection of the reversionary interest of wives. Is there, then, a merger which defeats this rule? Legal merger there cannot be: but, if there had been, equity would not permit a merger at law to defeat equitable estates and interests. Such has been the rule, at least, since the time of Charles II., as is proved by *Thorn v. Newman*,^(c) *Nurse v. Yerworth*.^(d) Will it, then, when there is no legal merger, introduce the doctrine of merger into trusts, solely for the purpose of defeating equities and destroying its own jurisdiction in the protection of the interests of married women? I cannot, also, but refer upon this part of the case to the able argument of Mr. Randall in *Hall v. Hugonin*,^(e) showing how impossible it was to prejudice the wife in her own reversionary interest by others bestowing upon her gifts which she might afterwards disclaim, and thereby revive her reversionary

(a) 14 Sim. 595.

(b) 1 Russ. 1.

(c) 3 Russ. 65.

(e) 3 Swan. 603.

(d) 3 Swan. 618.

(f) 14 Sim. 595.

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interest, after this court, if it should make the order prayed, had destroyed it by treating it as an interest in possession. The observations of Sir W. Grant in *Richards v. Chambers*(a) leave no doubt as to what would have been his opinion upon the case now before me, which I am glad to refer to, because another case before the same eminent judge, that of *Doswell v. Earle*,(b) has been referred to as an "authority in support of the petition. It is sufficient to observe that the rule of the court relating to the reversionary interests of married women was not adverted to, and that the widow's claim, which was not to the fund, but against representatives for a devastavit, was not made until after the lapse of many years from her husband's death: the report states that the bill was dismissed, but the grounds upon which that was done are not reported. *Pickard v. Roberts*,(c) is said to differ from the present, because in that case the life estate belonged to the husband; but the only difference is that in that case he held the life estate in his own right, and in the present he holds it *jure mariti*.

Independently of the very recent decisions which I am by this appeal called upon to review, I should have considered the attempt to obtain possession, by an order of this court, of a fund in which a married woman has such an interest as was provided for this lady by her marriage settlement, as one which the court could not sanction, as being in violation of the rules and principles of this court for the protection of married women, which have been established for that laudable purpose in defiance of legal rights, and the evasion of which this court will not permit. I must, however, consider these recent decisions. I have against the claim made by this petition, the judgment of the Master of the Rolls in this case; and I have also his refusal to make the order in *Story v. Tonge*.(d) I have, on the other hand, several cases decided by the Vice-Chancellor of England, which are reported in 14 Sim. 593, giving effect to such a claim. The first of these in date appears to be *Lachton v. Adams*, 13th August 1836, reported also in 14 Law Journal, 382, which is, in

(a) 10 Ves. 580.

(b) 12 Ves. 473.

(c) 3 Madd. 384.

(d) 7 Beav. 91.

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[*738] principle, the same as *the present. The report says that his Honor made the order ; but the married lady's consent not having been taken, and the Vice-Chancellor having risen, counsel applied to me to take such consent, and that I thereupon said that the life interest had merged, and that the interest of the married lady was no longer reversionary. I have not any recollection of the transaction ; but, as the order had been made, and as all I was asked to do was to take the married woman's consent, it is not very probable that I should have entered into the merits of the case, or expressed any opinion upon it. If any such expressions were used as those reported, they are much more likely to have been used by the counsel who made the application ; but, be that as it may, it is quite clear, from the report, that the application was *ex parte* ; and the observation, if made by me, which I greatly doubt, was so made without consideration, without argument, and without reference to authorities. An opinion expressed under such circumstances ought not to have any weight attached to it. That case, however, does show the view the Vice-Chancellor took of the claim in question. The next case in date is *Wilson v. Oldham*,^(a) in which it must be presumed that the same principle was intended to be acted upon, but in which case there does not appear, from the report, to have been any union of the interests or any possibility of a merger, because the husband's assignment of his wife's reversionary interest being inoperative, Wilson, who claimed under it, and to whom the life interest was assigned, never had the two interests united in him. In other respects it was precisely this case : but *Creed v. Perry*,^(b) in 1845, went further ; for there being a fund in court of which Ann Taylor was entitled to the dividends for her life, *and [*739] Ann Raynor entitled to the principal after her death, the consent of Ann Taylor and Ann Raynor being taken in court, the fund was ordered to be paid to the husband of Ann Raynor. In *Hall v. Hugonin*^(c) the case now under consideration clearly and distinctly arose. It appears to have been well argued ; and

(a) 14 Sim. 594.

(b) 14 Sim. 592.

(c) 14 Sim. 595.

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the judgment of the Vice-Chancellor must be considered as the expression of his deliberate opinion.

Those cases though rather numerous, are all of recent dates ; and the importance of the subject, and the practice which they encourage of attempting to deprive married women of the protection of this court for their reversionary interests by schemes such as this petition discloses, compels me to act upon the opinion I have formed, notwithstanding these cases. The reversionary interest of the wife entitled to the protection of this court continues, in my judgment, still reversionary for the purpose of such protection, notwithstanding the attempts made to exclude it. The petition must therefore be dismissed.

***LORD v. THE GOVERNOR AND COMPANY OF COPPER [740]
MINERS and others.**

1848: December 5.

A demurrer to a bill by one of the share-holders of an incorporated mining company on behalf of himself and all the other share-holders except the members of the governing body, who were defendants, impeaching several transactions of that body, which it appeared had been sanctioned by majorities at general meetings of the share-holders, and amongst which was a project to vest all the property of the company in trustees for the purpose of liquidating its affairs, was allowed, notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants, and an allegation that, by the constitution of the company, no one but the governing body could convene a general meeting ; the specific acts complained of not being clearly such as, in the opinion of the court, it was incompetent to a majority of share-holders to sanction.

The doctrine of *Foss v. Harbottle*, (2 Hare, 492,) and *Moxley v. Alston* (1 Phill. 700,) as to the interference of this court in the internal administration of incorporated companies, confirmed.

THIS was an appeal from an order of Vice-Chancellor Knight Bruce, overruling two general demurrers to the bill, which was filed by the plaintiff on behalf of himself and all the other share-holders in the company, except the members of the governing body, against the company itself, the members of the governing body, the Bank of England, and several other parties who were

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alleged to be holders of debentures, notes, or other securities affecting the property of the company, which the bill sought to impeach.

The bill commenced by setting forth an abstract of certain letters-patent of William and Mary, by which the company had been incorporated by the name of the Governor and Company of Copper Miners in England; from which abstract it appeared that the company was empowered to hold land not exceeding the yearly value of £6000, and goods and chattels to any amount, and to raise a joint stock, and the same to increase or diminish from time to time, as the company and their successors should find most fitting and convenient; that the [741] *management of the affairs of the company was vested in a Governor and Deputy-Governor, and ten or more assistants, who were to be annually elected at general meetings of the shareholders, and that the Governor and company and their successors were empowered to hold courts for the purpose of consulting concerning the affairs of the company. The bill then set forth various prospectuses which had been issued by the governing body of the company in the years 1841 and 1842, and in consequence of which, it alleged that many shares had been disposed of, announcing that the nominal capital of the company was £1,000,000, consisting of 10,000 shares of £100 each, a considerable number of which still remained unappropriated; but that it had been calculated that a paid up capital of £650,000 would be sufficient to carry on the contemplated business of the company, being £65 per cent. on the nominal amount of the shares, of which £33 was to be paid immediately, and the remainder in calls not exceeding £10 at intervals of not less than two months.

The bill then stated that the whole management of the concerns of the company devolved upon the Court of Assistants, consisting of the Governor and assistants, who rendered no accounts to, and were subject to no supervision of, the shareholders at large, but that twice in every year, general meetings of the shareholders were convened by the Court of Assistants, at one of which the election of the elective officers of the company was carried on, and at each of which the Governor and Deputy-

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Governor would deliver a speech or report to the shareholders, purporting to inform them of the condition and prospects of their affairs.

The bill then stated that, at the half-yearly general meeting of April 1844, the Governor had announced *that [*742] all the shares in the company had been disposed of, and had represented the affairs of the company as in a highly prosperous condition; and that at the half-yearly general meeting of April 1846, after making a similar representation, he proceeded to state that it had appeared to the court that they were best consulting the interests of the shareholders by delaying as far as was practicable, the making of calls, and that, as that view had appeared to meet with the full approbation of the shareholders at several previous meetings, they had from time to time borrowed considerable sums of money, for terms varying from two to seven years, and that, owing to unforeseen circumstances, it had become necessary to make immediate arrangements for liquidating a considerable portion of those loans, and for which purpose, in order to avoid the necessity of making additional calls upon the proprietors, which they conceived would be inexpedient, they proposed to raise a sum not exceeding £500,000, by the issue of preference shares of £25 each, redeemable by the company after the expiration of ten years, at a sum not exceeding £30 per share, the holders of such shares in the meantime to have a priority of right to a dividend, not exceeding a certain amount, before any dividend should be declared upon the original shares. The bill then stated that a resolution to that effect was unanimously adopted by the meeting, and that at the half-yearly general meeting of April 1847, the Governor announced that the sum of £400,000 had been raised by the issue of such preference shares, and that, having accomplished the immediate objects they had in view considerably within the limit which had been voted, the Court of Assistants had discontinued the issue of any more such shares: that the Governor then made various statements, to show the prosperous condition of the Company, and concluded by announcing *a [*743] dividend of $7\frac{1}{2}$ per cent. on the paid up capital of the preference shares, and a dividend of 5 per cent. on that of the

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original shares. The bill then alleged that, shortly after the delivery of that speech, the company became so embarrassed in its circumstances that it was no longer practicable for the Court of Assistants to withhold from the shareholders the knowledge of the truth, but that, instead of immediately convening a general meeting, they called together a private meeting of the preference shareholders, to which the plaintiff, who was then the holder of scrip certificates for 200 of such shares, was summoned, and at which, after stating generally that the company was much embarrassed, owing to various untoward circumstances, the court proposed that a fresh issue of preference shares should be made, for the purpose of raising more money, to which proposition several of the preference shareholders then present at first assented, but that shortly afterwards it was disclosed by some member of the Court of Assistants, as the fact was, that the court had converted, or assumed to convert, a number of the preference shares already issued into debentures, or some similar security on the property of the company, upon which the plaintiff immediately requested to be allowed to convert his own preference shares into such debentures or securities, but that such application was refused, the Deputy Governor stating that no fresh conversion would take place, in consequence of a promise to that effect made by the court to the Bank of England; upon which the plaintiff protested against the whole proceeding as illegal.

The bill then stated, that after some further discussion, the proposal to issue additional preference shares was ultimately rejected, and that, in consequence of such rejection, the Court of Assistants convened a special general meeting of the [744] shareholders for the 13th of October 1847, when, after adverting to the pressure then existing in the money market, and the numerous failures of commercial establishments, and referring to what had passed at the meeting of preference shareholders, the Governor stated, that the Court of Assistants had agreed with the Bank of England, subject to the sanction of the shareholders, for a loan of £270,000 at 5 per cent. on mortgage of the real estate of the company, of which sum, £150,000 would liquidate engagements of the company already

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in the hands of the bank, and the remaining £120,000 would come into the company's possession in cash. The bill then stated that a resolution to that effect was, in fact, carried without any dissentient voice; but it charged that the meeting had been convened without any notice being given of its object, or any knowledge on the part of the shareholders of the state of the finances of the company, except the general statements which had been made at the previous meeting of the preference shareholders; and that owing to the crowded state of the room, and the alarm and bewilderment of the shareholders present, sufficient time and opportunity were not afforded for discussion, and that upon some of the shareholders expressing a desire to be informed of the nature of the alleged liabilities of the company to the Bank of England, and the mode in which they had been created, the Court of Assistants had flatly refused to give any explanation, merely stating that, unless the proposed arrangement with the bank were confirmed, the works of the company would stop, and its affairs would be involved in immediate ruin. The bill further charged that the plaintiff had been desirous of attending at that meeting, but that he had been refused admittance on the ground that he was not then registered as a shareholder in the books of the company, and that several other holders of scrip for shares like himself had been *excluded on the same ground, which the bill charged [745] that they ought not to have been.

The bill then stated that the proposed mortgage to the Bank of England had been carried into effect in pursuance of the last-mentioned resolution; but it charged that the meeting at which that resolution was passed was illegal and incomplete, and that the mortgage was procured from the shareholders by undue concealment and pressure, and that it ought to be declared void.

The bill then proceeded to state that, on the 10th of February, 1848, another special general meeting was assembled, at which the Court of Assistants, without rendering any accounts, or giving any explanation of their transactions, informed the shareholders that it would be necessary to vest the property of the company in trustees for the purpose of putting its affairs into a course of liquidation, and that, notwithstanding a protest entered by the

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plaintiff (who had since the last meeting procured himself to be duly registered as a shareholder) against such a proposition, a resolution was then put and carried by the shareholders present at such meeting, authorizing the Court of Assistants "to affix the common seal of the company to a deed to be prepared under the advice of the company's solicitors, vesting the property of the company in trustees, with power of sale of all or any part of such property from time to time for the liquidation of debts, and to protect the interests of all concerned."

The bill then stated that, by the constitution of the company, there was no power for any one or any number of the shareholders to call a general meeting of proprietors; but that such power resided wholly in the Court of Assistants, and that the [*746] Court of Assistants *refused to call any meeting for the purpose of taking into consideration the matters before mentioned; and that the plaintiff was wholly ignorant of the names or places of abode of the great majority of the shareholders; and that the defendants refused to discover who such shareholders were, or where they respectively resided.

The bill then charged that the plaintiff and the other shareholders took their shares on the faith and understanding that the capital stock of the company raiseable, independently of the resolution of April, 1846, was limited to the sum of 650,000*l.*; and that the Court of Assistants had, in excess of their authority, increased such stock to a very great extent, and, in particular, that they had issued, at a heavy discount, to the defendants constituting the said court, and also to certain other defendants (whom the bill alleged to be the only other holders of securities from the company whose names were known to the plaintiff) divers loan notes or promissory notes under the seal of the company, purporting to be promises by the company to pay the monies therein mentioned; and that the said court had treated such notes as transferable by delivery, and that some of such notes had been transferred to the Bank of England, which claimed to be the owner thereof; whereas the bill charged that the said court had no authority to issue such notes, and that the same were unlawful in their creation and invalid.

The bill further charged that the plaintiff and the other pre-

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ferential shareholders accepted such shares on the faith and understanding that they should all continue alike on the footing of shareholders; and that neither the Court of Assistants nor the Governor and Company had any power or authority, without the consent of every individual shareholder, to convert any of the said preferential *shares into debentures, or prom- [*747] issory or loan notes of the Company; and that all debentures and notes which had arisen from such conversion were void; but that it was intended that the trustees to be appointed in pursuance of the resolution of the 11th of February, 1848, should be empowered to pay, and that they should pay forthwith the monies purporting to be due on such debentures and notes, as well as upon all other debentures and notes which had been issued as aforesaid; and that there was great danger of the property vested in such trustees being misapplied and wasted to the injury of the plaintiff and the other shareholders.

The bill prayed, in substance, an account of the affairs of the Company, and an investigation of the debentures and other securities which had been issued by the Court of Assistants; and that such of them as should be found to have been issued in excess of their authority should be declared void; and that the defendants, the members of the Court of Assistants, might make good to the other shareholders any loss which they might have incurred thereby; and that the mortgage to the Bank of England might be set aside as having been unduly obtained, or might, at all events, stand as a security for 120,000*l.* only; and that the defendants, the governing body, might be restrained by injunction from putting the corporate seal to the proposed deed for vesting the property of the company in trustees, and from making any payment in respect of any debenture or note which should appear not to be a lawful and valid debt of the company.

The demurring parties were the company and the members of the Court of Assistants.

On the hearing of the appeal,

**Mr. Bethell* and *Mr. Willcock* appeared for the com- [*748] pany, and *Mr. Bacon* for the Court of Assistants.

Mr. Russell, *Mr. Rolt* and *Mr. Hobhouse* for the plaintiff.

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The argument turned upon the principles of the court's interference with the internal administration of incorporated companies at the suit of individual members, as illustrated by the cases of *Adley v. The Whitstable Company*,^(a) *Ward v. The Society of Attornies*,^(b) *Foss v. Harbottle*,^(c) *Mozley v. Alston*,^(d) *Attorney-General v. Wilson*,^(e) *Preston v. Grand Collier Dock Company*.^(g) In support of the bill reliance was placed upon the charge that, by the constitution of the company, a general meeting of the shareholders could be convened only by the Court of Assistants, and that they refused to convene such meeting, and also that the plaintiff was ignorant of the names and addresses of the other shareholders: it was, however, further contended that the alleged acts of misconduct on the part of the Court of Assistants in reference to the conversion of preference shares, to the improper issue of debentures, and to the intended transfer of the property of the company to trustees, were acts in excess of their legitimate powers, and such as no majority of the shareholders could give validity to; and, therefore, that, independently of the above charges, showing the plaintiff's inability to convene a general meeting, he had a right to institute a suit for relief in the present form; *Foss v. Harbottle*.^(h) In answer to which it was insisted that, by the general law, it was competent to any member of an incorporated company to convene a general meeting, *unless such power were expressly taken away by the provisions of the charter; and that, as there appeared to be no such provision in the charter as set out in the bill, a mere unsupported allegation that the power resided exclusively in the Court of Assistants, would not be attended to. But it was further contended that there was nothing to show, that, even if a general meeting were convened, it would be competent to such meeting to rescind resolutions which had been unanimously adopted at preceding ones; that, with respect to the charges of undue preference and concealment, they were too vague and general, it not being alleged that the representations made by the Governor, as to the general state of the company's affairs

(a) 17 Ves. 315.

(b) 1 Coll. 373.

(c) 2 Hare, 461.

(d) 1 Phill. 790.

(e) Cr. & Ph. 1.

(g) 11 Sim. 337.

(h) 2 Hare, 499.

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and the peril to which they were exposed, were untrue; and, lastly, that none of the transactions complained of was so plainly an excess of the powers of the company as to entitle individual members to impeach them, after they had been sanctioned and confirmed by general meetings of the shareholders at large.

In the course of the argument it was stated, that the Vice-Chancellor, in disposing of the case below, had not entered into any detail of the reasons of his judgment, but had merely stated that there was at least some ground for the relief prayed, and that the resolution for vesting the property of the company in trustees, might alone be thought sufficient to support the bill.

THE LORD CHANCELLOR.—This is one of those experiments which are now frequently made to bring the various questions arising out of the transactions of joint stock companies within the jurisdiction of this court. I have had occasion before to observe upon the duty of the court to adapt *its [*750] practice to the varying wants of the public; but I am not insensible to the danger of carrying this principle too far, and assuming a jurisdiction which this court may not have the means of so exercising as to promote the object of the suitors. There is great difficulty in drawing the line. Cases of this kind are, therefore, attended with great difficulty; and I have, in this instance, to regret that, in executing the duty of reviewing the decision of Vice-Chancellor Knight Bruce, I have not the benefit of being informed of the grounds on which it was founded, his Honor having merely stated that, in his opinion, there was no defect for want of parties, and that there was at least some ground for the relief prayed; and that the resolution of the 10th of February only might be thought enough to support the bill. I postponed my judgment, not on account of any difficulty I felt in this particular case, but because I thought it important, as far as possible, to act in conformity with some recent cases, and to expound the principles on which the course of practice of this court ought, in my opinion, to be founded.

[His Lordship then stated shortly the nature and objects of the suit; and, after adverting to the unlimited power given to the company of increasing or diminishing its capital, and to the con-

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stitution and powers of the governing body, he proceeded as follows:—]

The first matter necessary to be observed upon is the complaint made of the resolution of the 10th February 1848, authorizing the vesting of the property of the corporation in trustees for the purpose of paying its debts. This is the allegation which Vice-Chancellor Knight Bruce is reported to have said was of itself sufficient to support the bill; but I have not [751] been informed whether it was supposed to be an excess of authority or an improper use of it. I cannot consider it as either. The bill indeed contains various charges of improper issuing of notes, debentures, and other securities by the defendants; but the allegation is much too general to be of any avail; and, although such securities are alleged to have been issued at a heavy discount, I do not find any allegation that such securities were worth more.

The principal ground of complaint is the alleged conversion of preferential shares into debentures. No particular case is stated amounting to a fraudulent benefit conferred upon any individual by such means; but the objection is made to the system adopted. If this was fairly done, it does not appear what objection can be made to it. It could only be done with the concurrence of the holders of the preferential shares; and if the debentures given are not of more value than the shares, no injury is done; and there is no charge that they are so. If the other preferential shareholders shall allege that they are injured by creating debts which come in before them in lieu of preferential shares which come in with them, the original shareholders cannot join in any such case. Both the creditors and the preferential shareholders have a priority to them, and yet the plaintiff makes this complaint on behalf of both sets of shareholders.

This objection would be fatal to the bill in its present state. It is not, however, the point on which I decide this case. I find all the complaints made by the individual shareholder to consist of acts within the powers of the corporation, and all sanctioned by general meetings of the shareholders, and no allegation raising any case for the interference of a court of equity with the exercise of such rights.

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*A court of equity could not assume jurisdiction in [*752] such a case, without opening its doors to all parties interested in corporations or joint stock companies or private partnerships, who, although a small minority of the body to which they belong, may wish to interfere in the conduct of the majority. This cannot be done, and the attempt to introduce such a remedy ought to be checked for the benefit of the community.

In *Foss v. Harbottle*,^(a) Sir James Wigram acted on this principle, because the acts were capable of confirmation; and in *Mozley v. Alston*,^(b) I expressed my strong approbation of Sir J. Wigram's decision in that case. Here the acts have been actually confirmed, and are, therefore, the acts of the whole body. There is no case that calls upon this court to entertain such a suit, and the evils of doing so I think would be very serious. I therefore think the demurrers must be allowed.

*THE ATTORNEY-GENERAL v. LUCAS.

[*753]

1848: Nov. 24.

In settling the property of a minor, who has been married in fraud of the provisions of the Marriage Act, 4 G. 4, c. 76, the court is bound to carry into effect the directions given by the act for preventing the offending party from deriving any pecuniary benefit from the marriage, as far as may be without prejudicing the pecuniary interests of the innocent party and the issue of the marriage. And, therefore, in a case where the minor was a female, the court refused its sanction to a general power of appointment being given to her, in case she should die before her husband, over one-third of her property, though there should be children; as she might exercise it in favor of her husband to the prejudice of the children; but the court approved of a power being given to her in case she survived her husband, though there should be children, of appointing such one-third either by deed or will; as it was for her benefit to be able in that case to make provision for a second marriage.

Held, also, that it was no objection to the settlement, that a child dying in the lifetime of the father, after having attained a vested interest under its limitations, might bequeath such interest to the father

THE defendant, Mr. Lucas, having married a minor in fraud of the Marriage Act, 4 G. 4, c. 76, this information was filed under

(a) 2 Hare, 493.

(b) 1 Phill. 809.

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the 23d section of the Act,(a) for the purpose of having her property, consisting both of realty and personalty, settled under the direction of this court.

By the settlement, as approved by the Master, the whole of the property, both real and personal, was to be vested in [754] trustees, in trust for the wife for life (the "trust during the coverture to be for her separate use, without power of anticipation,) with remainder as to one-third, if she survived her husband, in trust for her absolutely; but if she died in his lifetime, then in trust as she should by will appoint, and, in default of appointment, upon the same trusts as the other two-thirds; and as to the other two-thirds, whether she died in her husband's lifetime or not, in trust for the children of the marriage as she should by will appoint; and, in default of appointment, equally amongst the children who, being sons, should attain twenty-one, or, being daughters, should attain that age, or marry with the consent of their parents or guardians, with the usual powers for maintenance and advancement; and, in case there should be no child who should attain a vested interest, then, if Mrs. Lucas survived her husband, in trust for her absolutely; and, if he survived her, in trust as she should by will appoint, and, in default of appointment, for her heir at law and next of kin, as if she had died intestate and unmarried: and there was a covenant by the husband, to settle any after acquired property of the wife to and upon the same uses and trusts.

Exceptions taken to that settlement by the Attorney-General having been overruled by Vice-Chancellor Wigram, this was an appeal from his Honor's decision.

(a) The section provides that if any valid marriage be procured, by a party to such marriage, to be solemnized with a minor, in fraud of the provisions therein contained, such party knowing of the fraud, "it shall be lawful for the Attorney-General &c., by information, &c., to sue for a forfeiture of all estate, right, title, and interest in any property which hath accrued or shall accrue to the party so offending by force of such marriage; and such court shall have power in such suit to declare such forfeiture, and thereupon to order and direct that all such estate, right, title, and interest shall be secured under the direction of the court for the benefit of the innocent party, or of the issue of the marriage, or of any of them, in such manner as the court shall think fit for the purpose of preventing the offending party from deriving any interest in real or personal estate, or pecuniary benefits from such marriage."

 1848.—The Attorney-General v. Lucas.

The *Solicitor-General* and Mr. *Heathfield* appeared for the Attorney-General (the appellant.)

Mr. *Rolt* and Mr. *Collins* for the respondent.

On the part of the appellants, it was said that the settlement, as it stood, did not, as required by the act, effectually prevent the husband from receiving any pecuniary benefit from the marriage, inasmuch as under "the power given to the wife" [*755] of appointing one-third of the property by will, though she should die in the lifetime of her husband and leave children, she might appoint that one-third to her husband, in exclusion of the children; and, even as to the other two-thirds, if he should survive any of his children after they had attained a vested interest in a share, either by the appointment of the mother or in default of appointment, he might acquire such share, either by the intestacy of or gift from the child; to prevent which it was suggested that the settlement should contain a proviso that, in the event of the death of a child during the lifetime of the father, after attaining a vested interest, the share of such child should go to its children, if any; and, if none, then to the surviving children of the marriage.

In support of these objections, it was contended, that the act had left to the court none of that discretion which it was in the habit of exercising in the case of a clandestine marriage with one of its own female wards; the primary object in those cases being the welfare of the ward, and the punishment of the husband being only secondary; *Bathurst v. Murray*,^(a) *Birkett v. Herbert*.^(b) Whereas the primary object of the act was the prevention of clandestine marriages generally, which it proposed to effect by excluding the offending party, as a punishment, from any possibility of pecuniary benefit from the marriage; *Attorney-General v. Mullay*.^(c) In answer to which it was argued, that the words "it shall be lawful," and "the court shall have power,"

(a) 8 Ves. 74.

(b) 3 My. & K. 227.

(c) 4 Russ. 339.

 1848.—The Attorney-General v. Lucas.

were inconsistent with the notion that the court was to have no discretion in the framing of the settlement, and that at [756] least they were not so imperative as to "exclude all consideration of what might be for the benefit of the wife and children: the effect of which would be, by endangering the peace and harmony of families, to involve the innocent parties in the punishment intended only for the guilty one.

THE LORD CHANCELLOR.—In the general outline of the argument, as to the construction of the act, I concur with the appellant. This case has, clearly, no analogy to the ordinary case of a clandestine marriage with a ward of the court. In those cases the discretion of the court is unfettered; whereas the act certainly meant to punish the husband, and it is impossible not to see that the directions there given as to the settlement, furnish the rule by which the court is to be regulated.

The first direction is, as to the forfeiture of all the estate or interest which the husband may acquire by force of the marriage—that is, *jure mariti*; and the act then goes on to direct what is to be done with the property, including the interest so forfeited: the direction is, that it is to be settled for the benefit of the wife and the issue of the marriage, in such manner as the court shall think fit, for the purpose of preventing the husband from deriving any interest in real or personal estate, or any pecuniary benefit from such marriage.

The court is to carry that direction into effect, as far as may be without prejudicing the objects of the settlement: the husband is to get nothing to the prejudice of those parties: but it would be a great injury to the wife to say that, though she should have no children, or any one else whom she might be anxious to pro-

vide for but her husband, she is not to have the power [757] *of giving him a benefit. So far, however, as the giving her such a power may by possibility interfere with any pecuniary interests of herself or the issue of the marriage, it is precluded by the act: and I am, therefore, of opinion, that the general power proposed to be given to her by this settlement, of appointing one-third of the property, though there should be children, would be at variance with the directions of the act, and

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that the proper settlement will be—that, if there be no children, the wife should have a power of appointing the whole, during the coverture, by will, and, if she survive her husband, either by deed or will : if there be no children, and the wife dies first, then the whole to go to the children, if sons, at twenty-one, and, if daughters, at twenty-one, or marriage ; but, if she survive her husband, then two-thirds to the children of the marriage, and one-third to be subject to her appointment by deed or will ; for, though there is no express provision for the purpose in the act, it is a great benefit to a widow to be able to make provision for a second marriage.

With respect to the suggestion of limiting over the shares of children who should die during the lifetime of their father after having attained a vested interest, I think it is open to the objection that it would be punishing the issue for the sake of punishing the father. It is a different thing, the father taking from the bounty of a child, and taking from the marriage.

*NORTH-EASTERN RAILWAY COMPANY v. MARTIN. [*758]

1848: Nov. 26.

The equitable jurisdiction in matters of account is concurrent with that of courts of law, and no precise rule can be laid down as to the cases in which it will be exercised, this court reserving to itself a large discretion upon the subject, in the exercise of which it will pay due regard to the nature of the case and the conduct of the parties, and will not restrain an action already commenced, merely on the ground, that, from the number and complexity of the items in the account, a Judge *ad nisi prius* would urge the parties to refer it.

An injunction in such a case refused on the ground of delay ; the bill not having been filed until six months after the action was commenced, and the injunction not moved for until another six months after answer, and when the cause was ready for trial.

THIS was the renewal, by way of appeal, of a motion which had been refused by the Vice-Chancellor of England, for an injunction to restrain an action which had been brought by the defendants, Martin and Fox, who were in partnership as surveyors and engineers, for the sum of 6793*l.*, being the balance of their account for work done and expenses incurred by them, in

1848.—North-Eastern Railway Company v. Martin.

the course of their employment by the company, from the 20th July 1845 to the 7th April 1847, the bill praying that the account might be taken in this court, not only as being a mutual account, but as being too complicated to be examined with necessary accuracy in a court of law.

It appeared that the account, which was delivered by the defendants in October 1847, consisted of about 160 items of charge, amounting in the whole to upwards of 20,000*l.*, against which credit was given for various sums, which had, from time to time, been paid by the company on account, and amounting together to about 13,700*l.*, leaving the balance of 6793*l.*, for which the action was brought. The bill charged that these payments rendered the case one of mutual accounts; and it also complained of a want of particularity in the items of charge, setting forth the ten first, as follows, by way of a specimen :—

[*759] *1845: July 21, August, September, October, and November, 30. Attending your engineers over your several proposed lines of railway, and, under their instructions, directing and superintending preparation of the surveyor's plans, sections, and lithography of all the North Kent Line and its branches [enumerating five,] and assisting the engineers in laying on, calculating, and checking the gradients, making traces for references, levels, and lithographies, and enlarged plans of the several towns upon the various lines; examining and correcting the lithography, and assisting in getting up the plans and sections for the deposits with the clerks of peace and others, and attendance upon engineers, solicitors, directors, and others, in reference to this business, 134 days at 3*l.* 3*s.* - - - £422 2 0

	£	s.	d.
Cash paid—Travelling and incidental expenses	-	-	- 135 15 6
9 Assistants 405 days, at 3 <i>l.</i> 3 <i>s.</i>	-	-	- 1257 15 0
Cash paid—their travelling and incidental expenses	-	-	- 446 16 0
18 Assistants 579 days, at 2 <i>l.</i> 2 <i>s.</i>	-	-	- 1215 18 0
Cash paid—their travelling and incidental expenses	-	-	- 427 18 0
9 Assistants 456 days, at 1 <i>l.</i> 1 <i>s.</i>	-	-	- 478 4 0
Cash paid—their travelling and incidental expenses	-	-	- 209 4 0
Cash—maps, &c.	-	-	- 130 0 0
Presents to assistants, by order of Mr. Stephenson	-	-	- 155 0 0

It further appeared, that, before pleading to the action, the plaintiffs had obtained a Judge's order upon the defendants to deliver particulars of the several items of the account; in pursuance of which, a somewhat more detailed account had been

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rendered, and that a subsequent application to the Judge for further particulars had been refused.

The bill alleged, that many of the charges in the account were improper, and it sought minute discovery respecting them, charging that, without such discovery, the plaintiffs would have no means of defending themselves against them; but that, with the aid of such discovery, they would have a good defence.

The answer, which was filed in time to prevent the plaintiff from obtaining the common injunction, insisted [*760] that the plaintiffs had shown no ground for equitable relief, and that the bill was filed merely for delay; stating that, though the action was brought in November 1847, and the cause was at issue in February 1848, the bill was not filed until the month of May following, nor the injunction moved for below until November.

Mr. *Stuart*, Mr. *J. Bailey*, and Mr. *Greenwood*, in support of the appeal motion, said, that the delay in filing the bill was occasioned by the attempts made at law to obtain a more detailed account; and they relied on *Nixon v. The Taff Vale Railway Company*,^(a) and particularly on the observations of Lords Brougham and Campbell on that case, as to the invariable practice at Nisi Prius of referring such cases, from the great inconvenience of investigating them before a jury.

[THE LORD CHANCELLOR.—The reasons given by the lords for their judgments in the House of Lords are no part of the judgment of the house: the order only is to be looked to for that.]

Mr. *Bethell* and Mr. *Taylor*, for the defendants, referred to *Kirk v. The Bromley Union*,^(b) and contended that the jurisdiction of this court, in matters of account, only applied to cases of mutual accounts, (*Connor v. Spaight*),^(c) and not even to all cases of that kind: for instance, when the account, though mutual, was so simple as to be easily taken at law. *Foley v.*

(a) 1 Cl. & Fin. N. S. 111.

(b) Ante, p. 640.

(c) 1 Sch. & Lef. 309.

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Hill.(a) That in the present case, the account was not, within the meaning of the rule, a mutual one, as all the items [*761] on one side were admitted. That in *Nixon v. The Taff Railway Company*, there was a complication of several accounts; besides which, no action had been brought before the bill was filed; and that no case was to be found in which, the jurisdiction being confessedly concurrent, this court had interfered after a court of law had got possession of the matter.

[THE LORD CHANCELLOR.—Suppose a case in which it was quite clearly more fit that the account should be taken in equity than at law, and that an action had, nevertheless, been brought; do you mean that in such a case this court would not grant an injunction? The only consequence would be, that both the proceedings would go on together.]

Mr. *Stuart*, in his reply, denied that the plaintiff's object was delay, and offered to pay the whole amount claimed into court; but Mr. *Bethell*, on being asked by the Lord Chancellor whether he was willing to accept that offer, declined it.

THE LORD CHANCELLOR.—I am of opinion that this is not a proper case for an injunction. It is applied for upon the ground that, under the circumstances disclosed in the pleadings, justice cannot be done, or not so effectually done, by a trial of the action as by an account taken before the Master. That may be; but it does not of necessity follow that the trial of the action ought to be restrained. The observations of two noble lords in the House of Lords, in the case of the *Taff Vale Railway Company v. Nixon*,(b) have been referred to as expressing [*762] opinions that accounts ought to be decreed in all cases in which references would be pressed at *nisi prius*; I apprehend that those observations were not intended to intimate any such rule or opinion, but were intended only to exemplify the great difficulty in dealing with such cases at law. But be that as it may, I cannot accept any such ground or measure for

(a) 1 Phill. 399.

(b) 1 Cl. & Fin. 111, N. S.

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exercising the equitable jurisdiction of this court in matters of account. It has rules and principles of its own, although the practical difficulty experienced in proceeding at law does form an important consideration in the exercise of the *discretion* of this court.

The jurisdiction in matters of account is not exercised, as it is in many other cases, to prevent injustice which would arise from the exercise of a purely legal right, or to enforce justice in cases in which courts of law cannot afford it; but the jurisdiction is concurrent with that of the courts of law, and is adopted because, in certain cases, it has better means of ascertaining the rights of parties.[1] It is, therefore, impossible with precision to lay down rules or establish definitions as to the cases in which it may be proper for this court to exercise this jurisdiction. The infinitely varied transactions of mankind would be found continually to baffle such rules and to escape from such definitions. It is, therefore, necessary for this court to reserve to itself a large discretion, in the exercise of which due regard must be had, not only to the nature of the case, but to the conduct of the parties. In the present case, both concur in satisfying me that the trial of the action at law ought not to be stayed; it is not a case of mutual accounts—the only items on the one side being certain payments by the company to the plaintiffs at law, which are not in dispute. The only matter in contest, therefore, is the amount of the claim of the surveyors, for services rendered to the *company: they cannot recover for any thing they do [*763] not prove to have been done under proper authority, or for more than they can prove such services to be fairly worth. That the defendants at law may have required discovery to meet such claim, is not now the question; whatever they established a right to they have had; and, it is pretty obvious from the frame of the bill, that this was all they originally sought, although, to avoid the immediate payment of costs, the bill is made to pray relief. That such was the view of the

[1] The action of account in courts of law is one of the most difficult and dilatory, as well as expensive, actions that ever existed; and, although in New York it has been attempted to be revived by statute, but few actions at law have been attempted under the statute. See *McMurray v. Rawson*, 3 Hill R. 62, and the cases there cited.

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plaintiffs in equity took of their own case is also pretty evident, from the course of proceeding. In October 1847 the account was delivered; and, in November 1847, the action was commenced: in February, 1848, it was at issue; but the bill was not filed till the 12th May 1848; and, although the answer was filed on the 24th, the application for an injunction was not made until the 13th November; and now, the cause standing for trial, I am asked to restrain the plaintiffs at law from proceeding in their action.

That this court ought to be much influenced in cases of this kind by any unexplained delay on the part of the plaintiffs in equity, I stated in *Thorpe v. Hughes*, (a) and it would, I think, be a matter of reproach to this court, if, in a case of concurrent jurisdiction, a party having proceeded at law up to the period of trial should be restrained by injunction from trying his action upon the application of his opponent, who, during that period, without any adequate excuse, permitted him so to proceed without any application to this court. In the exercise of the large discretion which, in such cases, is vested in this court, I am of opinion that, under these circumstances, this court ought not to interfere, and that this motion should be dismissed with costs.

[*764]

*ROWLAND v. MORGAN.

1848: Nov. 21, 22. Dec. 4.

A direction annexed to a bequest of chattels that they shall go as heirlooms, although accompanied by a direction to the executors to make an inventory of them, does not render such bequest executory, or give to a court of equity any power to modify the legal effect of the bequest, whatever that may be; the rule, though disapproved, being too firmly settled by modern decisions, overruling the contrary doctrine of Lord Hardwicke, to be now disturbed.

THE question raised by this appeal arose upon certain bequests of chattels as heirlooms, contained in the will and the second codicil of Henry Earl of Abergavenny, who died in 1843.

(a) 3 M. & C. 761.

1848.—Rowland v. Morgan.

The testator was seized of certain ancient family estates, which were inalienably settled by an Act of Parliament in the reign of Phillip and Mary, and under the limitations of which he was tenant in tail male, but restricted from barring the entail. He was also seized in fee of other estates, which he had himself purchased, and these he devised by his will to trustees, in trust for his eldest son John Viscount Neville for life, without impeachment of waste, remainder to trustees to preserve, remainder to the use of such person or persons as should or might be next entitled, upon the decease of the said son, to the family entailed estates, in such order and course successively, and for such estate and estates, and subject to such powers &c. as were expressed in the Act of Phillip and Mary: after which came the following bequest :

“And I hereby give and bequeath to my son John Viscount Neville, and to his heirs, earls of Abergavenny, my gold and silver plate and pictures, and all my books, lace, family pearls, necklaces, silver boxes and family robes, and all diamonds, miniatures, and gold and silver ornaments, to be held as heirlooms, except such things as I shall specifically bequeath by this my will. And I direct that my executors do make an “inventory of all such chattels and effects.” The testa- [*765] tor then gave all his wine and other liquors, and all his carriages and horses, his deer and all his live stock, and also his household furniture, linen and china, to his said son John Viscount Neville, “for his own use and benefit for ever.”

By the second codicil, after making some trifling bequests, the testator proceeded as follows: “And I declare my will to be that, in addition to the articles and things I have in my will made heirlooms, all and singular the miniatures and pictures, and all other the articles contained in two green boxes tied with tape, and sealed with my seal, and which are deposited in a drawer in my library, and also all the miniature seals and all other the articles contained in a small cabinet in my gallery, shall be considered and taken to be heirlooms, and I hereby give and bequeath them to my executors as heirlooms in my family, and I hereby authorize and direct my executors to make an inventory

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of all and singular the articles hereby bequeathed, and I authorize them to open such boxes and cabinet for that purpose."

The testator left his eldest son John Viscount Neville and a younger son William, for whom provision was also made by the will, and two grandsons, children of his son William, who were also named in his will, his only male issue surviving him. On his death, his eldest son John succeeded to the title and entailed estates, but died shortly after unmarried; whereupon the title and estates having devolved on the testator's second son William, the question arose whether the articles bequeathed by the will and second codicil as heirlooms belonged to the executors of Earl John, as having vested absolutely in him, or [766] whether those bequests were to be "considered executory, in which case Earl John would have been entitled only to the enjoyment of the articles for his life.

The suit was instituted by the surviving trustee and executor of the testator's will against Earl William and his two sons and the executors of Earl John, for the purpose of having the decision of the court upon that question: and Vice-Chancellor Wigram, before whom the cause was heard, having decided in favour of the executors of Earl John,(a) Earl William brought this appeal.

The argument in support of the appeal, consisted chiefly of a critical examination of the authorities for the purpose of establishing that the decision of Lord Hardwicke in *Gower v. Grosvenor*(b) and *Trafford v. Trafford*(c) had not been so distinctly overruled by the decisions of Lord Thurlow in *Foley v. Burnell*(d) and *Vaughan v. Burslem*(e) as to preclude the court from acting upon Lord Hardwicke's doctrine, that bequests of this kind were to be considered as executory.

The other cases which were referred to upon this point are mentioned in the Lord Chancellor's judgment.

Mr. Bethell, Mr. Lee, and Mr. Goodeve, for the appellant, and the Solicitor-General and Mr. Simson for his two sons, who

(a) 6 Hare, 463.

(b) Barnard, 54, 5 Madd. 337.

(c) 3 Atk. 347.

(d) 1 B. C. C. 274.

(e) 3 B. C. C. 101.

 1848.—*Rowland v. Morgan*.

were infants, contended that the bequest was executory, and that the chattels ought to be settled in such a manner as to go with the estates as far as the rules of law and equity would permit.

**Mr. Walker, Mr. Humphry, and Mr. R. Palmer for* [*767]
the executors of Earl John.

Dec. 4.—THE LORD CHANCELLOR.—The only question I have to consider is, whether this case falls within the principle of those decisions which have overruled Lord Hardwicke's judgments in *Gower v. Grosvenor*,^(a) and *Trafford v. Trafford*,^(b) for I am not at liberty to depart from such principle, whatever my opinion may be as to the propriety of the original adoption.

In 1806, in the case of the *Duke of Newcastle v. Lady Lincoln*,^(c) Lord Eldon thought himself so bound in the House of Lords. After the lapse of more than forty years I cannot be less bound in this court; but Lord Eldon did not think himself at that time precluded, and I do not now think myself precluded, from expressing regret that Lord Hardwicke's decisions had been departed from, seeing that those decisions were not obnoxious to any principle, and enabled the court to carry into effect the very obvious intention of the testator; whereas those which have overruled them treat provisions of this sort, as Lord Hardwicke expresses it in *Gower v. Grosvenor*, as express gifts to the party, on purpose to defeat the intention of the testator: but, however much I may lament, I cannot correct, the evils arising from those later cases; I have therefore only to consider 1st. What is the rule and principle established by these late cases? and 2ndly. Does the present case fall within it?

*In *Gower v. Grosvenor* there was no express gift, but [*768] a direction that certain chattels should go as heirlooms, as the testator's real estate was settled, and Lord Hardwicke held that this was to be taken as directory to his executors, and said that when a man makes use of words of this kind, he does not make the limitation himself, but he leaves it to the law to

(a) *Ub. supr.*(b) *Ub. supr.*

(c) 12 Ves. 217.

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do it for him ; and in *Trafford v. Trafford*,^(a) in which there was a direct gift, he considered it as controlled by the general intent.

If these were now the ruling authorities there would be no doubt of their governing the present case ; but the last of these decisions was in 1746 ; and in 1783 the case of *Foley v. Burnell*^(b) was heard before Lord Thurlow, who decided upon the point now in question without any argument, the facts having been misunderstood throughout the discussion ; but, upon a rehearing before the Lords Commissioners, Loughborough, Judge Ashurst and Baron Hotham, Lord Hardwicke's judgments were overruled. Certain estates being so devised that Edward Foley became tenant for life, remainder to his first and other sons in tail, remainder over for life, &c. certain chattels were bequeathed to be held and enjoyed by the several persons who from time to time should respectively and successively be entitled to the use and possession of his houses, as in the nature of heirlooms, to be annexed and go along with the houses for ever. Edward, the tenant for life, having had a son born, who died shortly afterwards, the question was whether Edward, as representative of such son, or the plaintiffs, who were devisees in remainder, were entitled to those chattels ; and the Lords Commissioners held that Edward was entitled, expressly upon the ground that the deceased son, having been tenant in tail of the houses [*769] was absolutely entitled to the chattels ; *each of those learned Judges stating that the infant was entitled according to the terms used, *and that the court would not control them*. This case went to the House of Lords, and is reported in 4 Bro. P. C. 328, and the decree was there affirmed in 1785, the House having, by consulting the Judges, adopted a course which proved beyond all doubt, their opinion that the rights of the parties were to depend upon the legal import of the terms used in the will, and not upon the consideration of anything a court of equity might do for the purpose of carrying the apparent general intent into execution.

(a) *Ub. supr.*

(b) 1 B. C. C. 274.

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In *Vaughan v. Burslem*,^(a) in the year 1790, Lord Thurlow acted upon the same rule. There was no direct gift, but the direction was, that the chattels should go as heirlooms with the real estates, and be held and enjoyed by the person or persons who should, for the time being, be entitled to the testator's real estates, as far as the rules of law and equity would permit, and he directed that an inventory of the plate should go with the estates.

Such were the decisions which Lord Eldon in 1806, reviewed in the case of *Lady Lincoln v. The Duke of Newcastle*,^(b) when he came to the conclusion that, although he preferred the doctrine of Lord Hardwicke, the rule as laid down in these subsequent cases was to be the rule for the future; and concurring, as I do, in that opinion, it is useless to consider what my judgment in this case might have been, if these later decisions had not taken place. The question, indeed, is now further precluded by other cases which have followed the same rule, as *Carr v. Lord Erroll*.^(c) In *Lord*Deerhurst v. Duke of St. Albans*,^(d) Sir J. Leach affirmed the rule laid down, saying, that it was a direct gift, and nothing executory; although he did not very strictly act upon it, when he declared all persons tenants for life, whom being *in esse* at his death, the testator might have made so. This decision, however, was reversed in the Lords,^(e) upon grounds which do not touch the present case. *Lord Dorchester v. The Earl of Effingham*, before Sir W. Graft, 1813,^(g) and *Mackworth v. Hinxman*, before Lord Langdale, in 1838,^(h) do not apply directly to the present question, but both tend to exemplify the soundness of the principle adopted by Lord Hardwicke.

2ndly. It remains to be considered whether this case does or does not fall within the principle of those decisions by which, I have said, that I find myself bound. By those decisions, a gift of chattels to be used as heirlooms, and enjoyed by the persons entitled to real estates, is to be treated as a direct gift, and, there-

(a) 3 B. C. C. 100.

(b) 12 Ves. 226.

(c) 14 Ves. 478.

(d) 5 Madd. 232.

(e) 2 Cl. & Fin. 611.

(g) 3 Beav. 180. n.

(h) 2 Keen, 658.

 1848.—Rowland v. Morgan.

fore, vests in the first person entitled to an estate of an inheritance in the land, and is not to be protected further by the interposition of a court of equity. By the will, the gift is to my son John, Lord Viscount Neville, and to his heirs, Earls of Abergavenny. John became Earl of Abergavenny: the words were well adapted to create an estate of inheritance; not less so by the qualification required of being Earls of Abergavenny. It is true that the testator has added that the articles bequeathed are to be held as heirlooms, and that his executors should make an inventory of them, leaving no doubt as to what

he intended, and affording a sure guide to the court, how [*771] to carry his purpose into effect *if it had the power to interfere; but circumstances, which, the cases I have observed upon decide, do not prevent the gift being direct, and therefore do not give the court any such power.

The second codicil does not vary the case, as it appears upon the will, for it only gives certain other chattels as heirlooms, and directs an inventory to be made by his executors, and it gives those articles, in addition to the articles and things by the will made heirlooms. The case upon the will and codicil is, I think, the same; John, Lord Neville, was the testator's heir, and had an estate of inheritance (in the chattels,) under the words of the will, without reference to the titles to the real estates, which are not referred to; the only heirship referred to being the heirship of the earldom, and that only for the purpose of restricting and qualifying the fee before given.

Acting upon the rule established in the cases before referred to, that this bequest is to be treated as direct, and not executory, I am bound to declare that John, the eldest son, became absolutely entitled to both sets of these chattels, and, therefore, to confirm the decree appealed from. with costs.

1848.—Ex parte Stevens.

IN THE MATTER OF THE LONDON AND SOUTH WESTERN RAILWAY EXTENSION ACT. [772]

EX PARTE STEVENS.

1848: Dec. 22.

The sum deposited by a railway company in court under the 85th section of the Lands' Clauses Act, 8 Vict. c. 18, is not subject to any lien for the costs of the vendor; but upon the performance of the condition of the bond mentioned in the same section, the company are entitled to have the money paid out to them, notwithstanding the pendency of a question between them and the vendor with respect to such costs.

A party served with a petition does not forfeit his right to the costs of his appearance merely because his counsel at the hearing has raised an unsuccessful opposition to the prayer.

THE company having occasion to take immediate possession of a piece of land in which Mrs. Stevens had an interest, but being unable to come to an agreement with her as to the price of such interest, the company had it valued by a surveyor in the manner prescribed by the 85th section of the Lands' Clauses Act (8 Vict. c. 18,) and paid the sum of 235*l.*, being the amount of such valuation, into court, at the same time executing a bond as required by that section. The purchase having afterwards been completed, and the purchase-money paid, the company presented a petition for payment out of court of the sum so deposited; but, at the hearing of the petition before the Vice-Chancellor of England, it was opposed by Mrs. Stevens, on the ground that she had been put to certain costs by the purchase, which the Taxing Master, in taxing her costs, had not thought fit to allow, as not falling within the terms of the 80th section of the act; but for which she insisted that she was entitled to a lien on the fund in court; and the Vice-Chancellor, after observing that the 87th section contained no imperative direction to the court to order repayment of the deposit upon the completion of the purchase, and that it was reasonable that whatever costs the vendor might fairly be entitled to against the company should be paid [773] before the fund was parted with, made an order referring it to the Master to inquire whether any and what costs had been properly incurred by Mrs. Stevens in consequence of the purchase

1848.—*Duke of Beaufort v. Morris*.

or taking of the lands, other than the costs specially provided for by the 80th section of the action.

Upon an appeal by the company from that order,

Mr. *Stuart* and Mr. *Law* appeared for the appellant.

The *Solicitor-General* and Mr. *Taylor*, for the respondent, gave up the claim of lien, and rested their case upon the ground taken by the Vice-Chancellor.

THE LORD CHANCELLOR (without hearing a reply).—I have not to decide whether the party is entitled to any costs against the company, or, if she is, what is her remedy ; but merely whether she is entitled to the payment of such costs, if any, out of this fund.

The act provides that, in the case which here occurred, the company, before taking possession of the land, should deposit the estimated value and execute a bond ; and that, upon the condition of such bond being fully performed, it should be lawful for the court to order that the money so deposited should be repaid to the party depositing it. Here it is not disputed that the condition of the bond has been fully performed : and that being the case it is quite impossible, without acting against the provisions of the statute, to refuse the order which the company asks for payment out of court of this money. I have nothing to do upon that application with any question of costs that the owner of the land may have incurred, unless such costs are made [*774] *by the act a charge on the fund, which they clearly are not. My order will not prejudice any claim which the party may have and which he may bring forward in a proper way. If the court has jurisdiction to entertain any question of costs, about which I say nothing, it would, on a proper case being made, put it in a course of inquiry ; but there is no ground whatever for engrafting such an inquiry upon the order to be made on the present application.

The counsel for the appellant then submitted that, as the re-

1848.—*Ex parte Stevens*.

spondent had improperly opposed the application below, she was not entitled to the costs of it.

THE LORD CHANCELLOR.—A party served with a petition does not forfeit his right to costs by his counsel, at the hearing, raising a claim unsuccessfully.

TULK v. MOXHAY.

1848: Dec. 22.

A covenant between a vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.

In the year 1808 the plaintiff, being then the owner in fee of the vacant piece of ground in Leicester Square, as well as of several of the houses forming the square, sold the piece of ground by the description of "Leicester *Square Garden [*775] or Pleasure Ground, with the equestrian statue then standing in the centre thereof, and the iron railing and stone work round the same," to one Elms in fee: and the deed of conveyance contained a covenant by Elms, for himself, his heirs, and assigns, with the plaintiff, his heirs, executors, and administrators, "that Elms, his heirs, and assigns, should, and would from time to time, and at all times thereafter at his and their own costs and charges, keep and maintain the said piece of ground and Square Garden, and the iron railing round the same in its then form, and in sufficient and proper repair as a Square Garden and pleasure Ground, in an open state, uncovered with any buildings, in neat and ornamental order; and that it should be lawful for the inhabitants of Leicester Square, tenants of the plaintiff, on payment of a reasonable rent for the same, to have keys at their own expense and the privilege of admission therewith at any time or times into the said Square Garden and Pleasure ground."

1848.—*Tulk v. Moxhay*.

The piece of land so conveyed passed by divers mesne conveyances into the hands of the defendant, whose purchase deed contained no similar covenant with the vendor: but he admitted that he had purchased with notice of the covenant in the deed of 1808.

The defendant having manifested an intention to alter the character of the Square Garden, and asserted a right, if he thought fit, to build upon it, the plaintiff, who still remained owner of several houses in the Square, filed this bill for an injunction; and an injunction was granted by the Master of the Rolls, to restrain the defendant from converting or using the piece of ground and Square Garden, and the iron railing round the same, to or for any other purpose than as a Square [*776] *Garden and Pleasure Ground in an open state, and uncovered with buildings.

On a motion, now made, to discharge that order,

Mr. *R. Palmer*, for the defendant, contended that the covenant did not run with the land, so as to be binding at law upon a purchaser from the covenantor, and he relied on the dictum of Lord Brougham C. in *Keppell v. Bayley*,^(a) to the effect that notice of such a covenant did not give a Court of Equity jurisdiction to enforce it by injunction against such purchaser, inasmuch as "the knowledge by an assignee of an estate, that his assignor had assumed to bind others than the law authorized him to affect by his contract,—had attempted to create a burthen upon property which was inconsistent with the nature of that property, and unknown to the principles of the law—could not bind such assignee by affecting his conscience." In applying that doctrine to the present case, he drew a distinction between a formal covenant as this was, and a contract existing in mere agreement, and requiring some further act to carry it into effect; contending that executory contracts of the latter description were alone such as were binding in equity upon purchasers with notice; for that where the contract between the parties was executed in the form of a covenant, their mutual

(a) 2 M. & K. 547.

 1848.—Tulk v. Moxhay.

rights and liabilities were determined by the legal operation of that instrument, and that if a Court of Equity were to give a more extended operation to such covenant, it would be giving the party that for which he had never contracted. He admitted, indeed, that the decisions of the Vice-Chancellor of England in **Whatman v. Gibson*,^(a) and *Schreiber v. Creed*,^(b) were not reconcileable with that doctrine; but he referred to the present Lord Chancellor's order, on appeal, in *Mann v. Stephens*,^(c) as apparently sanctioning it by the liberty there given to the plaintiff to bring an action, from which it was to be inferred, that his Lordship thought that the right of the plaintiff to relief in equity depended upon, and was commensurate with, his right of action upon the covenant at law.

THE LORD CHANCELLOR (without calling upon the other side).—That this court has jurisdiction to enforce a contract between the owner of land and his neighbor purchasing a part of it, that the latter shall either use or abstain from using the land purchased in a particular way, is what I never knew disputed. Here there is no question about the contract; the owner of certain houses in the Square sells the land adjoining, with a covenant from the purchaser not to use it for any other purpose than as a Square Garden. And it is now contended, not that the vendee could violate that contract, but that he might sell the piece of land, and that the purchaser from him may violate it without this court having any power to interfere. If that were so, it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worth less. It is said that, the covenant being one which does not run with the land, this court cannot enforce it; but the question is, not whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent *with the contract entered into by his vendor, [778] and with notice of which he purchased. Of course, the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able

(a) 9 Sim. 196.

(b) 10 Sim. 35.

(c) 15 Sim. 379.

 1848.—Tulk v. Moxhay.

to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.

That the question does not depend upon whether the covenant runs with the land, is evident from this, that if there was a mere agreement and no covenant, this court would enforce it against a party purchasing with notice of it; for if an equity is attached to the property by the owner, no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased. There are not only cases before the Vice-Chancellor of England, in which he considered that doctrine as not in dispute; but looking at the ground on which Lord Eldon disposed of the case of the *Duke of Bedford v. The Trustees of the British Museum*,^(a) it is impossible to suppose that he entertained any doubt of it. In the case of *Mann v. Stephens* before me, I never intended to make the injunction depend upon the result of the action; nor does the order imply it. The motion was, to discharge an order for the commitment of the defendant for an alleged breach of the injunction, and also to dissolve the injunction. I upheld the injunction, but discharged the order of commitment, on the ground that it was not clearly proved that any breach had been committed; but there being a doubt whether part of the premises on which the defendant was proceeding to build, was locally situated within what was [779] called the Dell, on which alone he had under the covenant a right to build at all, and the plaintiff insisting that it was not, I thought the pendency of the suit ought not to prejudice the plaintiff in his right to bring an action if he thought he had such right, and, therefore, I gave him liberty to do so.^(b)

With respect to the observations of Lord Brougham in *Keppell*

(a) 2 My. & K. 552.

(b) *Quære*, whether, if this was the object, an issue ought not to have been directed, as an action would depend not merely on the issue of fact, which was alone in dispute, but also upon whether the covenant ran with the land. It is clear, however, from the form of the order, that the injunction was not considered to depend upon the action; for if that had been the case, the plaintiff would have been ordered, and not merely left at liberty, to bring an action. See *Spottiswoode v. Clarke*, *ante*, p. 158.

1848.—*Tulk v. Moxhay.*

v. Bailey he never could have meant to lay down, that this court would not enforce an equity attached to land by the owner, unless under such circumstances as would maintain an action at law. If that be the result of his observations, I can only say that I cannot coincide with it.

I think the cases cited before the Vice-Chancellor and this decision of the Master of the Rolls perfectly right, and, therefore, that this injunction must be refused with costs.

**STEELE v. PLOMER.*

[780]

1849 : Jan. 18.

An objection of mere form, not going to the substance of the case, should be taken speedily; for if a party being aware of such objection, allows his adversary to take consequential proceedings without noticing it, he will not be allowed afterwards to raise it.

THE bill was filed against Mr. Plomer and his wife, and two other persons who were out of the jurisdiction, for the purpose of enforcing a charge upon the separate estate of Mrs. Plomer: and a subpoena against Mr. and Mrs. Plomer having been duly served on Mr. Plomer, an appearance was entered for both, on the 17th of May 1848. But at an interview which took place on the 25th of May, between the clerk of the plaintiff, who being a solicitor conducted the cause in person, and the solicitor of Mr. Plomer, the latter stated that the entering of the joint appearance was a mistake on the part of his clerk, his instructions having been to enter an appearance for Mr. Plomer only: whereupon the plaintiff's clerk consented to the appearance being altered by striking out the name of Mrs. Plomer, which was accordingly done. The terms upon which that consent was given were the subject of contradictory affidavits, the defendant's solicitor stating that the only stipulation made by the plaintiff's clerk was, that the transaction should be kept secret from his employer, while the plaintiff's clerk stated that it was part of the arrangement that an appearance should be entered for Mrs. Plomer by the plaintiff, under the 29th of May 1845. In point of fact such appearance was

 1849.—Steele v. Plomer.

entered for her upon an affidavit stating that a subpoena against her had been served upon Mr. Plomer personally. And the plaintiff by a letter of the 1st of June informed the defendant's solicitor that that had been done, and in a subsequent letter of the 16th of August he stated that he had issued an attachment against Mr. Plomer for want of an answer from him and his wife, and that, unless the answer were filed immediately, the attachment would be put in force. No answer, however, having been filed, the attachment was put in force; and the return being *non est inventus*, a writ of sequestration issued on the 8th of December 1848, and was executed against Mr. Plomer's property on the 30th of December.

In addition to the affidavits, the substance of which is stated above, there was one by the plaintiff, stating that what his clerk had done in reference to the alteration of the original appearance had been done without his sanction, and that he had remained in ignorance of it until the middle of October, having up to that time been under the impression that no other appearance had ever been entered for Mrs. Plomer but that which he had himself entered for her.

On the first day of Hilary term 1849, Mr. Plomer moved before Vice-Chancellor Knight Bruce to discharge the appearance entered for his wife, and all the subsequent proceedings, as irregular; and an order was made accordingly, on the ground that the affidavit on which that appearance was entered was informal, being intituled in a suit "between Steele, plaintiff, and William Plomer and wife, defendants,"—omitting the names of the other two defendants, who were out of the jurisdiction.

Upon an appeal motion now made to discharge that order, the cases of *Davis v. Barrett*(a) and *Rowlatt v. Cattell*(b) were referred to, as showing the insufficiency of the affidavit; [*782] but the counsel for the defendant also "raised a further objection—that the 29th Order of May 1845, did not apply to a married woman,(c) as it required an affidavit of personal service

(a) 7 Beav. 171.

(b) 2 Hare, 186.

(c) It will be seen that it is not necessary in this case to decide upon the validity of this objection; but the question arose incidentally a few days afterwards upon an application in a supplemental suit between the same parties.

 1849.—*Steele v. Plomer.*

on the defendant for whom the appearance was to be entered; whereas a married woman was not subject to such service; nor was it alleged in the affidavit in this case, that she had been so served, but only her husband.

On the other hand, it was contended that the entering of this appearance for Mrs. Plomer was regular; but that, at all events, it was too late, for her husband at least, to call [*783] it in question at so advanced a stage of the consequential proceedings (*Hunter v. Capron*; (a)) and that if the plaintiff's course had been in any respect irregular, the order of the Vice-Chancellor was not less so, having been made without notice to Mrs. Plomer, who might, therefore, still elect to treat the appearance which had been entered for her as a good appearance, and so the plaintiff might be embarrassed in the subsequent conduct of the suit.

THE LORD CHANCELLOR.—However important it may be that the general rules of practice should be strictly enforced nothing can be more injurious to the suitor, or more destructive

The plaintiff had, under the 33d Order of May 1845, served Mr. Plomer in Scotland, where he was then residing, with a subpoena for himself and his wife, to appear to and answer the supplemental bill; and Mr. Plomer having, in obedience to that subpoena, entered an appearance for himself, but none for his wife, the plaintiff moved before Vice-Chancellor Knight Bruce, under the 4th rule of the same order, for leave to enter an appearance for her, founding his motion on an affidavit of the former service upon her husband. The Vice-Chancellor, having understood that some doubt had been expressed by the Lord Chancellor in the case reported in the text, whether, having regard to the objection above referred to, service on a husband would warrant the entering of an appearance for the wife, either under the 29th or 33d Orders, declined to make the order, and suggested that the application should be made to the Lord Chancellor. That was accordingly done, and his Lordship, after referring to the Orders, granted the application, on the ground that, where husband and wife were sued together, it was the duty of the husband to enter an appearance for his wife as well as for himself; at the same time observing, that the objection founded upon the supposed necessity of personal service proceeded upon a misconception of the 29th Order, as the requisition that the subpoena should have been "duly served upon such defendant personally, or at his dwelling house or usual place of abode," meant nothing more than that it should have been duly served, the two modes of service mentioned being the only two in which ordinary service could be effected. L. C. 26th February 1849.

(a) 7 Jan. 185.

1849.—Steele v. Plomer.

of justice than to allow a party having an objection of this sort, not touching the substance of the case, but merely an objection of form, to keep it to himself, and to permit the other party to incur the expense of a long course of consequential proceedings, and then to come and say you have been wrong from the beginning, and all the proceedings are to go for nothing.

Here the plaintiff files his bill against a husband and wife. The husband is bound in such a case to appear for the wife. It seems indeed not to be essential that they should both appear at the same time; but the course is for the plaintiff to hold the husband bound to enter an appearance for both. In the present case the defendant's solicitor entered a joint appearance for the husband and wife. After that appearance had been entered—

as it is said, by mistake,—an arrangement is come to [784] between the plaintiff's clerk and the solicitor for the defendant that the original appearance should be cancelled, and should stand only as an appearance for the husband. But the plaintiff had still a right to compel the husband to enter an appearance for his wife. That being clearly his right, this fact is established beyond all question, that, the appearance standing only as an appearance for the husband, the plaintiff entered an appearance for the wife under the 29th Order. It is sworn that that was done with the concurrence of the defendant's solicitor: on the other side indeed that is denied; but it is impossible to suppose that it was done without some understanding as to the mode in which the defect in the appearance was to be supplied. It could only be supplied in one of two ways—either by the husband entering an appearance for his wife, or by the plaintiff entering one for her under the General Order. In one way or other the defendant must have understood that the defect of the appearance was to be supplied. On the 1st of June, he knew that it had been supplied in the latter way, and he then made no objection; and in the month of August he knew that an attachment had issued; which was regular enough, if the appearance had been regularly entered, but not otherwise. The process is afterwards carried on to sequestration, and it is not until that sequestration has been executed, and much expense incurred, that the regularity of the

1849.—*Steele v. Plomer*.

appearance, on which all the rest of the proceedings have been founded, is called in question.

Whether that proceeding was quite regular or not, I do not now concern myself to inquire ; for if the husband is not at liberty to dispute its regularity, the question is immaterial ; and that he is not so, is plain, if, as is asserted on one side, the appearance was entered with the concurrence of his solicitor ; but, however that may be, I think it would be contrary to justice, if, after allowing the *subsequent proceedings to go on with [*785] knowledge of such an objection as this, he were now to be permitted to avail himself of it. As I stated in *Hunter v. Capron*,^(a) justice requires that where an objection is not one of substance, but only of form, a party should be bound to bring it forward at once as soon as he knows of it. Without, therefore, deciding anything as to the regularity or irregularity of the appearance which was entered for the wife, I think the husband is precluded from disputing it, and on that ground I am of opinion that the Vice-Chancellor's order ought to be discharged ; but as that consideration applies only to the husband, and as the irregularity of the appearance, if it be irregular, would still be available to the wife in another form of proceeding, I would suggest to Mr. Parker, whether it would not answer his client's purpose better to let the Vice-Chancellor's order stand, on condition of the husband undertaking to enter an appearance for his wife,—not, of course, giving him the costs of the proceedings which have been actually taken.

Mr. *Parker*, after consulting with his client, said, that he anticipated no difficulty on the part of the wife, and, therefore declined the offer.

The Vice-Chancellor's order was accordingly discharged.

Mr. *James Parker*, and Mr. *Elderton* appeared for the plaintiff.

Mr. *Russell* and Mr. *Lewin contra*.

(a) *Ub. sup.*

 1849.—*Warde v. Warde*.

[*786]

*WARDE v. WARDE.

AND

In the Matter of the 2 & 3 Vict. c. 54.

1849: Jan. 20.

Where, upon an application by a wife who had obtained a sentence of divorce against her husband for the custody of her children, the conduct of her husband appeared to be such as clearly to render it improper that he should have the custody of the eldest child, a girl of eleven years old, the court made an order for the delivery of all the children (two of whom were under seven years of age) to the mother, holding it unnecessary to consider whether it would have made the same order with respect to the second child, who was a boy of nine years old, if his case had stood alone, as the effect of the children being brought up in different custodies would be likely to create factions in the family.

The object of the custody of Infants' Amendment Act (2 & 3 Vict. c. 54,) was to enable married women who should be ill-treated by their husbands, to assert their rights as wives, without being restrained by the fear of being separated from their children; for which purpose the Court of Chancery is invested by the Act with a discretionary power, which, by its inherent jurisdiction, it did not possess, of interfering with the common law right of a father to the custody of his children, such power varying in extent according as the children are under or above seven years of age.

A SEPARATION having taken place between Mr. and Mrs. Warde, and Mrs. Warde being in possession of their four children, the eldest of whom was a girl of the age of eleven years, the second a boy a year or two younger, and the other two under seven, Mr. Warde procured this suit to be instituted in the name of the children, for the purpose of making them wards of court, having previously settled upon each of them a small sum of stock as a foundation for the suit. And he then presented a petition, which was served upon his wife, praying that the children might be delivered to him. The petition was opposed on the ground of alleged profligacy and profaneness on the part of Mr. Warde: but the Vice-Chancellor of England, before whom it was heard in private, made an order for the delivery of all the children to their father.

From that order Mrs. Warde appealed by a petition, in-
 [*787] titled both in the cause and in the matter of the *Cus-
 tody of Infants Act, 2 & 3 Vict. c. 54. The appeal

1849.—*Ward v. Ward*.

petition was, at the request of the parties, heard by the Lord Chancellor in his private room, and a good deal of new evidence was brought forward. At the conclusion of the argument,

THE LORD CHANCELLOR expressed his great unwillingness to make a compulsory order, if it could be avoided, as it was advisable that the children should be brought up, if possible, with a respect for both their parents ; whereas the effect of such an order would be to hold out to them, that one of their parents was a person of such a character as not to be considered fit to be intrusted with them. Accordingly, his Lordship suggested that the petition should stand over, in the hope that by the intervention of common friends, some arrangement might be come to with respect to the residence and education of the children, which would render the interference of the court unnecessary.

"But,"(a) continued his Lordship, "for the guidance of the parties in acting upon this suggestion, I must say something with regard to the position of the children under the late act of parliament, as to the construction of which and the object with which it was introduced, some very erroneous notions appear to exist. The object of the act, and of the promoters of it, and that which I think appears upon the face of the act itself, was, to protect mothers from the tyranny of those husbands who ill-used them. Unfortunately, as the law *stood before, however [*788] much a woman might have been injured, she was precluded from seeking justice from her husband by the terror of that power which the law gave to him of taking her children from her. That was felt to be so great a hardship and injustice, that Parliament thought the mother ought to have the protection of the law with respect to her children up to a certain age, and that she should be at liberty to assert her rights as a wife, without the risk of any injury being done to her feelings as a mother. That was the object with which the act was introduced, and that is

(a) This paragraph is transcribed from the short-hand writer's note, the reporter not having been present, as the case was heard in private. He has been informed that the only cases which had been referred to in the argument, were those of *In re Taylor*, (11 Sim. 178) and *Ex parte Bartlett* (2 Coll. 661.)

 1849.—Warde v. Warde.

the construction to be put upon it. It gives the court the power of interfering; and when the court sees that the maternal feelings are tortured for the purpose of obtaining any thing like an unjust advantage over the mother, that is precisely the case in which it would be called upon, and ought, to interfere. When the parties, therefore, are considering the suggestion which I have thrown out, I wish them to bear in mind, that this is not, as was the case in *Wellesley v. The Duke of Beaufort*,^(a) a question merely as to the general jurisdiction of this court to interfere with the legal rights of the father; but that I have now an absolute authority over the children under seven years of age, and a larger power than the court then had, with regard to children above that age."

The petition accordingly stood over for eight or nine months, the children remaining with their father. During that interval Mrs. Warde obtained a sentence of divorce *a mensa et thoro*, on the ground of adultery, and an allowance of 1200*l.* a year for alimony, with liberty to apply for an increase of it, in the [*789] event of her obtaining the custody of her children. In this state of things, it having been intimated to the Lord Chancellor that there was no chance of an arrangement being come to, the petition was put into his Lordship's paper to be finally disposed of.

Mr. *Stuart* and Mr. *Dickenson* appeared for Mrs. Warde.

Mr. *Bethell* and Mr. *Gifford* for Mr. Warde.

Mr. *Jas. Parker* for the children.

THE LORD CHANCELLOR.—This is the most distressing case I ever had to deal with, not from any difficulty that I feel as to the course which I ought to pursue, but because, as in other cases of the same character, in attempting to do the best one can for the interests of those who are the objects of the protection of the court, it is impossible not to feel that one must inflict great pain

(a) 2 Russ. 1.

on some parties, and, after all, very inadequately provide for the care of the infants.

Children are by nature entitled to the care of both their parents; but when the conduct of one or both of the parents has been such as to render it impossible that they can live together, and the court has therefore the painful duty cast upon it of deciding whether the children shall be brought up by one parent or the other, all that I can do is to adopt that course which seems best for the interest of the children, without regard, so far as it interferes with that object, to the pain which may be inflicted on those who are the authors of the difficulty.

"Which of the parents in this case is in fault, is a [*790] question which does not depend upon my decision, for I have it under the hand of Mr. Warde in a letter to his wife's brother, written after the separation had taken place, that "his own folly and wickedness had deprived him of his best friend and his dear wife, who," he adds, "is a woman of the highest excellence, and one who has borne much from me."

That is a testimony of the highest authority as to the relative conduct of the parents, and it is consistent with the whole of the evidence which has been adduced; from which it clearly appears that the wife has been grievously abused and ill-treated by her husband; that for a considerable time she remained patient under the greatest injuries, but that at last she was driven to leave her husband, and take up her abode with her mother and brother.

I should have been glad if the husband had enabled me to dispose of the case in private, because the children are interested in concealing as much as possible the misconduct of either of their parents. But as he has from time to time published parts of these proceedings, it is due to the other parties concerned, that I should state the grounds of the order, which I propose to make, in public.

[His Lordship then said, that he should abstain entirely from entering into the conduct and habits of life of Mr. Warde, except so far as they were obnoxious to the children who were living under his roof; and, after noticing those parts of the evidence which were material in that view, he proceeded thus.]

1849.—Warde v. Warde.

[*791] *In *Shelley v. Westbrook*(a) the main ground on which the court proceeded, was the impiety and the irreligion of the father; but the case which establishes the principle on which I am about to act beyond all doubt was that of *Wellesley v. The Duke of Beaufort*.(b) There was in that case profligacy, adultery, and profaneness, a great deal of which is to be found in the present case: and Lord Eldon expressed his opinion without hesitation, that it was both the right and the duty of the court to remove the children from the contamination to which they were exposed from such an example. I think it my duty to adopt the same course in the present case as regards the eldest child, who, being a daughter, is, both from her sex and her age, more likely to be affected by what passes before her, and who, therefore requires the greater care. Whether I should have made the same order with respect to the eldest son, if his case had stood alone, it is not necessary to consider, because when I am compelled on such a ground to take one child from its father, I must not accompany that measure with the great evil and danger to the children of separating one portion of the family from the other—separating them not in fact only, but in feeling; for if one child were to be brought up by the father and the other by the mother, that very circumstance would create factions in the family, which it is the bounden duty of the court as far as possible to guard against.

As to the other children who are under seven years of age, the court has an absolute control over them, without regard to the peculiar common law right of the father to the custody of all his children. I think that is the true construction of [*792] the Act; but, whether it be so *or not, the principle to which I have adverted with respect to the second child would apply equally to the other two; and as I am obliged to remove one, I must remove all.

I understand that Mrs. Warde will undertake to maintain the children, and that her brother is willing to concur in that undertaking; which will obviate any objection to its being merely the undertaking of a married woman. The order, therefore,

(a) 1 Jac. 266.

(b) *Ub. sup.*

 1849.—Warde v. Warde.

which I shall make will be, that the children now in the custody of the father be delivered to the mother, she and her brother undertaking to maintain them till further order.

I see that in some cases, and amongst others in that of *Shelley v. Westbrook*, that has been accompanied by a restraint on the father from applying for a *habeas corpus*; as otherwise the order might be reversed by a judge at common law. Whether a judge would interfere or not, it is not for me to say; but I wish Mr. Stuart to consider what should be the form of the order in this respect.

Mr. Stuart.—I should wish the order to be in the same form as in *Shelley v. Westbrook*.

THE LORD CHANCELLOR.—Let it be so.

**MAPP v. ELCOCK*. [1]

[*793]

1849: January 31.

A will not affected by the 11 G. 4, & 1 W. 4, c. 40, commenced as follows:—"I give devise, and bequeath all my estate, real and personal, to W. E., his heirs executors or administrators, to and for the uses, intents and purposes following." Then followed certain declarations of trust, but which were applicable only to particular portions of the personal estate, and the will concluded by appointing W. E. his sole executor. Held (reversing the decision below,) that W. E. took the residue as trustee for the next of kin.

Observations on the conflicting opinions of Sir W. Grant and Lord Eldon in *Dawson v. Clark* (15 Ves. 409, and 18 Ves. 247,) and the opinion of Lord Eldon confirmed.

THIS was an appeal from part of a decree of the Vice-Chancellor of England, by which it was declared, that according to the true construction of the will of Samuel Henry Pare, who died before the passing of the Act of 11 G. 4, and 1 W. 4, c. 40, Edward Elcock the executor was not a trustee of the residuary personal estate of the testator, but was absolutely entitled thereto for his own use and benefit.

 1849.—Mapp v. Elcock.

The will, which was made in the island of Barbadoes, was as follows :—I give all my estate, both real and personal in this island to Edward Elcock, his executors, administrators, or assigns, to and for the several uses, intents, and purposes following ; that is to say, out of the rents, issues, and profits, and interest of all debts due to me, to pay unto my dear wife Anna Maria £300 yearly, in addition to her own fortune which survives to her ; and in trust, likewise to permit her to have the full use and enjoyment of all my negro slaves, except Jackey, whom I direct to be freed at the expense of my estate ; and in trust, also to permit her to use all my household furniture and plate, during her natural life ; and in trust, also to receive the interest only of the debt due to me from John Prettejohn, Esq., during the lives of the said John Prettejohn, and the lives of his son and daughter Charlotte Prettejohn, and John Prettejohn, [*794] jun. ; and in trust, likewise to discharge *the said John Prettejohn from the sum of £2500, which sum I bequeath unto his two children, the aforesaid Charlotte Prettejohn and John Prettejohn ; and, in case of their death, unto the aforesaid John Prettejohn himself ; and in trust, also to divide the remainder of the interest of debts due to me in the following manner, in equal proportions between N. E. Nolder Parris, Margaret Elcock, and Anna Maria Elcock, daughters of the aforesaid Edward Elcock ; and in case my said wife Anna Maria should intermarry and have children, in trust to divide the principal sums amongst such of the children as shall be living at the deaths of the aforesaid John Prettejohn, sen., Charlotte Prettejohn, and John Prettejohn, jun., and in the meantime to divide one principal sum of £1500, part of the debt due to me from the estate of Samuel Rous deceased, among and between the aforesaid N. E. Nolder Parris, and Margaret Elcock, and Anna Maria Elcock. On the death of the aforesaid Anna Maria my said wife, if there should be any doubt of the legality of the above trust for the children of my present wife by a future marriage, I then give such sum or sums as would have been their share or shares unto herself, upon such events as are before mentioned. Lastly, I nominate, constitute,

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and appoint the aforesaid Edward Elcock executor of this my last will and testament.

The testator died before the 11 G. 4, & 1 W. 4, c. 40, came into operation, and the bill was filed by one of his next of kin.

The appeal was argued before the last long vacation, by

Mr. *Stuart* and Mr. *G. L. Russell* for the appellant,

*Mr. *Bethell* and Mr. *Sandys* for the respondent. [795]

Jan. 31.—THE LORD CHANCELLOR.—This case, although not now one of general importance, owing to the alteration of the rule of equity by the 1 W. 4, c. 40, is yet one of some interest, as calling, as it is alleged, for a decision between the conflicting opinions of Lord Eldon and Sir William Grant, as expressed in the case of *Dawson v. Clark*.^(a)

The Vice-Chancellor appears to have thought there was not any such conflict, considering that case, before Sir W. Grant, as a decision on the point, and, before Lord Eldon, as only suggesting a doubt. I take a very different view of those two reports. Two questions arose in that case; first, whether the persons appointed executors took the property beneficially by the gift itself, subject to certain charges, and, if not, whether they took it in their character of executors. If their claim was good under the first, the second would not arise. Sir W. Grant, passing over the first question, decided in favor of the claim upon the second; but Lord Eldon thinking the title good under the gift, affirmed the decree upon that ground, very distinctly repudiating the ground on which Sir W. Grant had founded his decree. Now if Lord Eldon was right upon his construction of the gift, the claim on the ground of executorship could not arise, and Sir W. Grant's opinion was on a point not in question in the cause. This would not be very material, except as bearing on the observation of the Vice-Chancellor in this case, because there is the deliberate opinion of *Sir W. Grant on one [796] side, and the no less deliberate opinion of Lord Eldon on the other.

(a) 15 Ves. 469; and 36 Ves. 247.

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It therefore becomes necessary to examine the principles and grounds on which those opinions are respectively founded. It must be borne in mind, that the title of an executor to personalty not otherwise disposed of, did not arise from any gift of the testator, but from the operation of law incident to the office. The law vested the property in the executor, and if the testator had not directly or indirectly declared any purpose to which he was to apply it, there was nothing to interfere with the legal title of the executor, and he therefore retained such property for his own benefit: but this result, being, as was supposed, generally unforeseen and not intended by the testator, equity considered many circumstances as indicative of an intention contrary to the claim, and, when they were found in the will, declared the executor trustee for the next of kin; and among these was any expression showing that the executor was intended to hold the property upon trust; and where such intention sufficiently appeared, there could not be a more conclusive reason against the claim of the executor, whose title, depending on there being no trust, was necessarily negatived by the testator's declaration, that there was to be a trust.

It is now all but a century since Lord Hardwicke, in *The Bishop of Cloyne v. Young*,^(a) treated this as a settled rule. The principle on which it is founded is so satisfactory, that, if kept in mind, it must have excluded some nice distinctions which appear to me to be inconsistent with it. The executor claims the property as incident to the office, and as vested in [797] him by virtue of it, in the absence of any intention to the contrary expressed by the testator. But if the testator gives this same property to the same executor, or to any other person in trust for some purpose (for what purpose is immaterial) other than the beneficial enjoyment by the executor, he thereby shows an intention inconsistent with this incident to the office, and by so doing destroys it. The executor in such a case takes nothing but what is essential for the performance of the duties of his office: no beneficial interest in the property can vest in him as incident to it, for none remains which can so

(a) 2 Ves. 91.

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vest, the other provisions of the will having otherwise disposed of it.

This principle would appear to be applicable to all cases in which the property claimed as incident to the office appears by the will not to be incident to it, but to be severed from it in enjoyment, although, for other purposes, vested in the executor. The rule as expounded by Lord Eldon in *Paice v. The Archbishop of Canterbury*,^(a) embraces this principle: for Lord Eldon says, "If, as in the case in *Vezey*, the testator declares that he gives it in trust, and then does not declare the trusts, or, as in *Morice v. The Bishop of Durham*, the trusts declared fails, the executors, being clearly intended not to have the benefit, must be trustees for the next of kin."

Sir W. Grant's opinion in *Dawson v. Clark*,^(b) and the Vice-Chancellor's opinion in the present case, do not question the rule, that a gift to executors as such, in trust, excludes their claim to any beneficial interest, and that if the property be left to third persons in trust for purposes which fail, the executors have no claim. But "it is contended, that if the [*798] property, instead of being left to the executors in trust, or to third persons in trust, be left to the executors not as such but in their own names, upon trusts which fail or do not exhaust the property, that those trustees, in their character of executors, are entitled to the residue as incident to their office. I cannot see any principle for this distinction. If the official and private character of the persons appointed executors are to be considered as distinct, it would seem to be immaterial whether the trustees were the same persons who were named executors or strangers; and if the two characters are to be considered as united, the case of a gift to executors in trust is complete. It seems to be admitted that *Robinson v. Taylor*^(c) would negative the supposed distinction, unless a gift in trust "to the executors hereinafter named" be so different from a gift to the persons by name, who are afterwards appointed executors, as to operate a transfer of the residue from the next of kin to the executors. It would be to be regretted, if the title to property were to depend on such

(a) 14 Ves. 370.

(b) 15 Ves. 415.

(c) 2 B. C. C. 589.

 1848.—*Mapp v. Elcock*.

unsubstantial distinctions. The difference is merely in the mode of expression, for the purpose of pointing out the same individual; but, unless this distinction can be maintained, it would seem that *Robinson v. Taylor* ought to have governed the decision in *Dawson v. Clark*. Sir W. Grant, however, in that case maintained the distinction, and in effect held, that, although a gift in trust to my executors A. and B. would entitle the next of kin, a gift in trust to A. and B., afterwards appointed executors, would entitle the executors, to the residue.

No case appears to have been referred to, and no [*799] earlier case has been produced, sanctioning such a distinction. When this case of *Dawson v. Clark* came before Lord Eldon on appeal,^(a) he decided it upon a point that does not arise in the present case; but he most distinctly expressed his opinion, that the distinction relied upon between that case and *Robinson v. Taylor* could not be maintained, and showed clearly that he would not have affirmed the decree on the ground on which Sir William Grant had decided it.

It is true that in *Southouse v. Bate*,^(b) Sir William Grant seemed to think those grounds satisfactory. No one can be more inclined than I am to pay every deference to the opinions and judgments of that most eminent judge, but I cannot adopt the grounds on which he acted in that case. The view taken of it by Lord Eldon appears to me to be perfectly correct, and to be founded on the true principles which have regulated the decisions on this subject.

Having, therefore, the case of *Robinson v. Taylor*, and the high authority of Lord Eldon, and fully concurring in all he is reported in *Dawson v. Clark* to have said on the subject, I am bound in applying myself to the case now under appeal to consider that doctrine so laid down by Lord Eldon as my rule and guide; and that disposes of the present case; for it cannot be distinguished from *Dawson v. Clark* as to the part of it to which I have adverted.

There is first a gift of all the real and personal estate "to Edward Elcock, his heirs, executors, administrators, and assigns, to

(a) 18 Ves. 247.

(b) 2 Ves. & Bea. 226.

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and for the several uses, intents, and purposes following." Then come several directions as to parts of such property, in each of which it is described "as held upon trust; and [800] the will concludes with these words: "Lastly, I nominate, constitute, and appoint the said Edward Elcock executor of this my last will and testament." This is clearly a gift of the whole property in trust, though the trusts declared do not exhaust the whole.

In argument the difficulty of contending for a beneficial interest in the executor under such circumstances, seems to have been attempted to be met by considering the appointment of the executor, as in the nature of a gift of so much of the property as had not been before disposed of. But that cannot be. The last clause appointing an executor does not give any property. If any interest accrues to the executor, it is not by way of gift, but as incident to his office. If the appointment were equivalent to the gift of the residue, how could the gift of a money legacy deprive the executor of it? Again, the whole property having been before given, this appointment, if equivalent to any gift of property, could only operate upon the beneficial interest; but the title of an executor to a beneficial interest, arises from the legal title vested in his office, and cannot consist of an equitable interest to be satisfied out of a legal title vested otherwise than in the office.

I must, therefore, reverse the decree of the Vice-Chancellor, and declare the executor a trustee for the next of kin.

"SHARP v. TAYLOR.

[801]

1848: March, April. 1849: January.

Illustration of the distinction between enforcing illegal contracts and asserting title to money which has arisen from them.

The courts of this country will not refuse to administer justice between joint importers of any article of commerce merely upon proof that in the production or exportation of such article some fiscal law of the country of produce has been violated.

One of two partners who has possessed himself of the property of the firm cannot be allowed to retain it by merely showing that, in realizing it, some provision of some act of parliament has been violated or neglected.

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A. and B., British subjects, purchased and repaired an American built ship, on a joint speculation, with a view to employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States in the name of C., a citizen of that country, upon a false declaration that she was *bona fide* the sole property of C. After the ship had made several voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, and, in spite of the dissent of A., sent her on another voyage to America. Held, that, even supposing the declaration above-mentioned and the registration thereby effected to have been a fraud upon the American law, and the subsequent employment of the ship so registered to have been a fraud upon the English navigation Laws, such fraud would not prevent A. from maintaining a suit against B. for an account and payment of his share of the *realized* profits of the speculation. And in decreeing such account, the court also directed an inquiry what had become of the ship since she was sent on her last voyage, and what was her value when so sent, with a view to making B. personally liable for such value in case either the ship or the proceeds of her sale should not be ultimately forthcoming.

THE Victoria, an American ship, having been stranded off the port of Liverpool, in the month of January 1839, and the correspondents of the owners in this country having, after several ineffectual attempts to get her off, determined to put her up to sale by auction as she lay, the plaintiff and the defendant Taylor agreed to bid for her on their joint account, and, in case they became the purchasers, to repair and refit her, and afterwards to resell her. They accordingly bid for her at the auction, and became the purchasers of her for the sum of 420*l*. But as the ship, having been originally built in the United States, could not be registered in England as a British ship, they determined to have her registered in the United States in the name of

[*802] *one Robertson, an American merchant at Charleston, who was a common friend of theirs, and a correspondent of Taylor, and to employ her in the American trade until she could be disposed of to advantage; and they accordingly had the bill of sale made out to them as agents for Robertson.

The ship having been so purchased was brought into port where she was thoroughly repaired, under the superintendence of the plaintiff, at an expense of upwards of 6000*l*., by far the greater part of which was advanced by Taylor. While the repairs were in progress the plaintiff, on the 13th of June 1839, wrote to Robertson, informing him of the purchase, and of the

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agreement between himself and Taylor with respect to it; and after mentioning that, for the reason above stated, it had been arranged that the ship should be registered in America in Robertson's name, he added—"The vessel, therefore, according to the register, will appear to be your property, although belonging to Mr. Taylor and myself."

The repairs being completed by the end of July, the ship was freighted and sent, under the command of one Lennox, an American citizen, on a voyage to Charleston, where she was consigned to a mercantile firm there of Robertson & Co., in which Robertson was a partner; but before she sailed the plaintiff and Taylor took from Lennox, as master, a bottomry bond in the penal sum of 12,300*l.*, conditional for payment to the plaintiff and Taylor of the sum of 6150*l.* (therein recited to be the sum advanced by them for the repairs of the ship) within ten days after her safe arrival at Charleston.

*Before the arrival of the ship at Charleston, Robert- [803]
son wrote to the plaintiff an answer to his letter of the 13th of June, stating as follows:—"I am in receipt of your valued favor of the 13th of June, and learn with much pleasure the good speculation you have made in the purchase of the *Victoria*. As regards the ownership I will do all that is required, and comply with any orders you may give as to the disposal of her."

On the arrival, however, of the ship at Charleston, Robertson wrote to the plaintiff another letter, dated the 20th September 1839, as follows:—"The *Victoria* has arrived safe at Charleston. I am disappointed to learn, however, that she will cost a great deal more than I was led to believe. In consequence of the declaration required to be made at our Custom House, and to which I had not, when I last wrote you, given due reflection, I am obliged to assume the whole *bona fide* ownership of the vessel; therefore neither you nor Mr. Taylor can be considered as owners or part owners of the ship. I am willing, however, and so I have written Mr. Taylor, to assume the whole ownership of the vessel, on condition that a reasonable and convenient time be allowed to me to pay for her, and to allow you and Mr. Taylor a fair commission on the transaction, or such compensation as

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may be agreed upon amongst us all. The costs and repairs of the ship prove to be full 2000*l.* more than Mr. Taylor had led me to expect. I therefore think, if 500*l.* was allowed betwixt you and Mr. Taylor as a compensation, it would be as much and even more than can be afforded, as it would be equal to a commission of 10 per cent. ; if this should not, however, be satisfactory, I can make over to you again, or any of your friends, the ship, on receiving the amount Mr. Taylor had advanced and charged to me. Consult with Mr. Taylor on the matter, and let me know the result."

[*804] *This letter led to some negotiations between the parties, in the course of which the plaintiff expressed his willingness to surrender his interest in the ship to Robertson, on payment of the amount of his advances, and a commission of 5 per cent. on the whole outlay, provided he were allowed a share of the earnings of the vessel in the meantime; while, on the other hand, Taylor professed his readiness to accede to Robertson's proposal of a commission without any share in the earnings of the ship, insisting that he had explained to the plaintiff from the first that, if the ship was to be registered in the United States, it must be the sole property of Robertson, and that neither he (Taylor) nor the plaintiff could have any share in it.

Original bill.—While these discussions were going on, the ship continued to ply between Liverpool and Charleston with cargoes of the produce of the respective countries under the direction of Taylor, at the former place, and of Richardson & Co. at the latter. But on her second return to Liverpool in the month of April 1840, the plaintiff called upon Taylor for an account of the earnings of the ship, and to concur with him in a sale of her, still insisting that Robertson was only a trustee, and that he (the plaintiff) and Taylor were the sole owners of the ship; and upon Taylor refusing compliance, and proceeding to freight the ship for another voyage to Charleston, the plaintiff filed the original bill in this cause against Taylor and Robertson, who was out of the jurisdiction, charging upon the evidence of a correspondence between Taylor and Robertson, which was set out at length, that the claim of Robertson to the ownership of

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the vessel was made at the instigation of Taylor, and that it had been collusively agreed between Taylor and Robertson that the latter, although he insisted on being the owner of *the ship, as against the plaintiff, should nevertheless [*805] hold it at the disposition and on account of Taylor; or that, as between himself and Taylor, he should be charged with and account for the full value of the ship and all the monies which he should receive in respect of it; and that the accounts between Taylor and Robertson had in fact been kept upon that principle. The bill also charged that large sums, arising from the earnings of the ship on her four voyages between Liverpool and Charleston, had been either received by Taylor or allowed him in account by Robertson, and that Taylor had on several occasions shipped goods of his own in the ship, in respect of which freight was payable to the plaintiff as a part-owner of the ship.

The bill prayed a declaration that the plaintiff and Taylor ought to be charged with and to bear in equal proportions all the monies expended in the purchase of the ship, and in repairing and refitting her, or otherwise on her account since the purchase, and were entitled in equal shares to all the monies which had been earned by the ship since the purchase, and that the necessary accounts might be taken, for the purpose of ascertaining what was due from Taylor to the plaintiff, or from the plaintiff to Taylor, on the footing of such declaration; and that, in taking such accounts, Taylor might be charged with all monies which had been received by Robertson on account of the ship or the freight thereof, for which Taylor had had credit in account with him, and that the ship might be sold under the direction of the court, and the proceeds divided between the plaintiff and Taylor in the proportion in which they should appear to be entitled thereto after taking the before mentioned accounts; and that in the meantime Taylor might be restrained from removing the ship, or causing or allowing her to be removed from the port of *Liverpool: or if it should appear that Robertson had be- [*806] come the beneficial owner of the ship, then that Taylor might be decreed to account with the plaintiff for all the monies for which he had had credit in account with Robertson, or which

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he had otherwise received, or which without his wilful neglect or default he might have received, in respect of the purchase-money or value of the ship or of the monies expended by the plaintiff and Taylor in the purchase and repairing of the same, or otherwise on account thereof.

Injunction.—Immediately on the filing of the bill, the plaintiff moved for and obtained an injunction as prayed; but on the evening of the day on which the order was made, and before notice of it could reach Liverpool, Taylor had despatched the ship with a cargo to the United States, having previously taken from the master a new bottomry bond similar to the former one, except that it excluded the name of the plaintiff as a co-obligee. On this occasion the ship was consigned to Messrs. Wood & Co., correspondents of Taylor at New York, with instructions to dispose of the cargo, and apply the proceeds towards the disbursements of the ship; and in case Robertson, as the registered owner, should not furnish a power of attorney for the sale of the ship, to proceed against him on the bottomry bond, which was forwarded to them for that purpose.

Supplemental bills.—The plaintiff, having thus failed in his attempt to prevent the sailing of the ship, filed a supplemental bill, charging that, by so sending the ship to the United States while she remained registered there in the name of Robertson as the sole owner, Taylor had placed her completely under the control of Robertson, and exposed her to the danger of being attached by Robertson's creditor's in that country, and praying, [*807] therefore, that, in taking "the accounts sought by the original bill, Taylor might be charged, either with the full value of the ship on the 19th of May, the day when she last sailed from Liverpool, or, at all events, with the amount of the monies which he had received, or had credit for, from Robertson, on account of the sums expended in the purchase and repair of the ship, or on account of commission thereon.

Answer.—The defendant Taylor, in his answer to the original and supplemental bills, alleged that, by the statute law of the

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United States, no ship was entitled to the privileges of a ship of that country unless it were duly registered; and that the party applying for such registry was required to make oath, amongst other things, that there was no subject or citizen of any foreign country or state directly or indirectly, by way of trust, confidence or otherwise, interested in such ship or in the profits or issues thereof, under penalty of the forfeiture of the ship, in case any of the matters of fact in such oath should not be true. That the plaintiff was aware of this law at the time when it was resolved to have the ship registered in the name of Robertson, and that it was fully understood by the plaintiff, as well as by the defendant, that, in taking that step, they were divesting themselves of all legal title to the ship, and were trusting entirely to the honor of Robertson for any share in the profit to be derived from the sale of the ship, or in the freight to be earned in any voyage she might make. At the same time, the defendant admitted "that it was clearly understood between him and the plaintiff that, whatever profit arose or accrued from the sale of the ship, or from freight to be earned by her, after paying her expenses, was to be for their joint and equal benefit; and he said that he was quite ready to abide by that agreement, and had never disputed it."

"The defendant, however, further stated, that he had [*808] acted merely as agent and consignee of the ship for Robertson, and that, in the accounts between him and Robertson, credit had been given to the ship for the freights earned on the several voyages, and for the net proceeds of such goods as had been shipped on the ship's account. Under all the circumstances, he submitted, that Robertson was not to be considered as a trustee for him and the plaintiff, and that, at all events, the plaintiff had no title to relief against him (Taylor;) but that his remedy, if any, was against Robertson in the United States.

With respect to the sailing of the ship from Liverpool on her last voyage, the defendant admitted that she had sailed with his sanction, but insisted that, being an American ship under the command of an American citizen, he would have had no right to detain her if he had wished to do so. And he stated his belief, that the ship had been sold at New York.

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Evidence.—No direct evidence was given by the defendant of the alleged law of the United States respecting the registry of ships ; but, among the letters of the plaintiff, which were in evidence, there were several in which the existence of such a law seemed to be assumed ; and it was proved that he had been active in procuring the authentication, by the American consul at Liverpool, of the various documents which were forwarded to Robertson for the purpose of the registration of the ship in the United States, amongst which was an affidavit that the ship was the *bona fide* property of Robertson.

Decree.—The cause was heard before Vice-Chancellor Wigram, and by the decree then made, after reciting that the “defendant Taylor had by his answer submitted to abide by [*809] *the agreement in his answer mentioned, viz. that, whatever profits should arise or accrue from freight to be earned by the ship after paying the expenses upon the footing of the agreement in the answer mentioned, should be for the joint and equal benefit of the plaintiff and the said defendant”(a) the following inquiries were directed :—

1st. What monies had been paid to or received by the defendant Taylor, in respect of the freight earned by the ship, or otherwise on her account ; and what other monies the defendant Robertson, or the firm of Robertson & Co., had become and were then liable to pay to the defendant Taylor in respect of the freights earned by the ship or otherwise, distinguishing what on account of freights, and what on other and what accounts ?

2d. What sums had been paid or laid out in respect of the purchase-money and repairs, or of advances or disbursements on account of, the ship, and by which party ?

3d. Whether any and what goods had been shipped on account of the defendant Taylor on board the ship, in any and which of her voyages, and what was the amount payable in respect of the freight of such goods, *without prejudice to any question in the cause ?*

4th. What sums had been received by, or by the order or for the use of, the plaintiff in respect of the ship ?

(a) This recital, which it will be observed is less extensive than the submission in the answer (p. 807,) is, however, extracted verbatim from the brief copy of the decree.

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5th. Whether the ship was sold under the bottomry bond in the pleadings mentioned, and for what amount, the *defendant, by his counsel, consenting to give credit before the Master for such amount, subject to all just allowances, and *without prejudice to any question in the cause?* [*810]

Report.—The Master, by his general report, answered all the above inquiries, except the latter part of the 1st (which was waived) and the 5th, in answer to which he merely set forth a letter of Messrs. Wood & Co. to the defendant Taylor, dated the 30th September 1840, stating that the ship, having been attached at New York by certain persons claiming to be creditors of Robertson and Taylor, had been put up to sale by auction on the 23d September, and that certain parties had been declared the purchasers, but that they had since refused to complete the purchase; and that such purchase having in consequence been cancelled, Messrs. Wood & Co. had purchased the ship themselves, subject to the approval of the parties interested, for a sum of 18,000 dollars, and that the ship had in the mean time been registered in the name of one of the partners in that house.

Further report.—An exception to the report on that point having been allowed, the Master made a further report in which, after finding, by consent of the parties, that the ship had been offered for sale by auction under the circumstances mentioned in Messrs. Wood & Co.'s letter, but that the sale so effected had been cancelled, the Master concluded with a finding, according to a charge brought in by the plaintiff, that the ship had not been sold under the bottomry bond; and that report was confirmed.

Further directions.—On the hearing of the cause for further directions before Vice-Chancellor Wigram, it was ordered that the accounts directed by the former decree should be carried on, and that it should be referred back to the *Master, [*811] without prejudice to any question in the cause, to inquire whether, since the attempted sale of the 23d September 1840 was cancelled, the ship had been sold, and to whom, and for what

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sum, and whether the defendant Taylor had received, or was entitled to receive, any and what sum for the purchase-money of the ship; and further directions and costs were reserved.

At this stage of the suit the whole case was brought before the Lord Chancellor upon an appeal by the defendant, and a cross appeal by the plaintiff, both from the original decree and from the order on further directions; the defendant contending, that the bill ought to have been dismissed at the original hearing, and the plaintiff, that he was entitled to a more extensive relief on both occasions than was given to him, particularly as regarded the relief prayed by the supplemental bill against Taylor personally, in consequence of his having sent the ship on her last voyage.

At the hearing of the appeal,

Mr. *Bethell* and Mr. *Follet* appeared for the plaintiff.

Mr. *Wood* and Mr. *H. Clarke* for the defendant Taylor.

The counsel for the defendant contended that as the plaintiff had not adopted the submission in the answer, the defendant was not bound by it, *Williams v. Shaw* ;(a) and they proceeded to argue that the plaintiff's case, involving, as it did, the confession of a falsehood and a deliberate violation of the navigation laws, both of the United States and of this country, was [*812] one upon which "he could found no title to relief in a court of justice. *Brackenbury v. Brackenbury* ;(b) *Pidding v. How* ;(c) *Lawrence v. Smith* ;(d) *Harmer v. Westmaccott* ;(e) *Stephens v. Robinson* ;(g) *Curtis v. Perry* .(h) That when the plaintiff claimed an interest in the ship, he was met by the fact of his having been a party to its registration in the United States as the sole and exclusive property of a citizen of that country, *De Metton v. De Mello* ;(i) and when he claimed an interest in the profits or earnings of the ship, he was in this dilemma,—either that the ship was duly registered as an Amer-

(a) 3 Russ. 178 n.

(b) 2 J. & W. 391.

(c) 8 Sim. 477.

(d) Jac. 471.

(e) 6 Sim. 284.

(g) 2 Cr. & J. 209.

(h) 6 Ves. 739.

(i) 12 East, 234.

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ican ship, and consequently the exclusive property of Robertson, which would, of course, negative all title of the plaintiff to her earnings: or that she was not duly registered as an American ship, in which case, as she would be entitled neither to the privileges of an American nor to those of a British ship, the traffic in which she had been engaged would be a violation of the navigation laws of both countries, and illegal: and, consequently, the plaintiff could not, in a court of justice, assert any title to the profits of it.

Jan. 1849.—THE LORD CHANCELLOR.—The difficulties which have arisen in this case proceed entirely from the views which have been taken of the effect of the law respecting ships in this country and in the United States: for, independently of such laws, the case of the plaintiff would have been very simple and clear. It may be as well to consider what would have been such case, if the property in *question [813] had been any description of property not affected by those laws.

The case partly admitted, and in other parts proved, would have shown a purchase of property on the joint account of the plaintiff and of the defendant Taylor, expenditure on such property to make it available, employment of it on the joint account and profit realized, and, ultimately, an exclusion of the plaintiff by the defendant Taylor from any participation in such joint property, and an appropriation of it to purposes foreign to the purposes of the contract between the parties. The decree in such a case would have been quite of course, including accounts of the purchase, expenditure, and profit of employment, and inquiries as to the disposal of the property, for the purpose of restoring the plaintiff to his rights and interest in it, if practicable, or, of, in some manner, providing compensation to him for the loss arising from such improper appropriation of it.

It is, however, contended, on behalf of the defendant, that this justice cannot be done, and that he is entitled to retain what he has so improperly obtained of the property of the plaintiff, or, at least, that this court cannot compel him to account for it; because, 1st. The ship registry Acts of this country render

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some part of the transaction illegal ; 2d. That the ship registry Acts of the United States render the whole of it illegal in this country ; and 3d. Because the ship never was the joint property of the plaintiff and of the defendant Taylor, but belonged to an American citizen, named Robertson, in whose name it was registered at New York.

The history of the transaction, as applicable to these points, is simply this :—An American built ship, having been [814] stranded at the entrance of the port of Liverpool, “and in that state, put up to sale, was purchased, by the plaintiff and the defendant Taylor upon a joint speculation. Great expenses were incurred in repairing her, supplied in money and labor, partly by the plaintiff and partly by Taylor ; but the latter appears to have advanced by far the greater part of the money. The ship, being a foreign built ship, could not obtain a British registry. It was, therefore, agreed, that she should be sent to America, and there registered in the name of Robertson, a correspondent of the parties ; but this, as appears from the correspondence, was only an expedient to avoid the difficulty arising from the registry Acts, it being clear that Sharp and Taylor intended to consider and to deal with the ship as their own, and to use the name of Robertson as a trustee for them ; and Robertson, at first, consented to lend his name for that purpose, although he must be supposed to have been aware of the difficulties arising from the ship registry laws of the United States, which such a scheme was exposed to. Subsequently indeed, and at the suggestion of Taylor, he insisted upon these difficulties as a reason for considering himself as the actual owner, as he necessarily was the registered owner, of the ship ; but this appears to have been a scheme arranged between Taylor and Robertson, for the purpose of excluding Sharp.

It does not however appear to me that this part of the case can be material in considering the question between Sharp and Taylor ; for, Robertson not being here, all that the plaintiff can obtain is payment of what Taylor has received on account of the joint adventure ; and for this purpose it is not material whether what was so received arose from freight or other profits due to Taylor and the plaintiff as owner of the ship, or from

1849.—Sharp v. Taylor.

payments made or allowed by Robertson on account of *the ship. In either case such receipts would be profits [*815] arising from the joint adventure as between Sharp and Taylor, and, as such, matters of account between them. Besides which the answer of Taylor, as the decree recites, submitted to abide by the agreement mentioned, that whatever profit should arise or accrue from freight to be earned by the ship after paying the expenses upon the footing of the agreement in the answer mentioned, should be for the joint benefit of the plaintiff and himself. Again, if Robertson were to be considered as the owner, the bottomry bond for the large expenditure in repairs at Liverpool would, as against such ownership, be available; and, whatever objections there may be to treating Sharp and Taylor as owners of the ship, there can be none to their title as joint owners of the bottomry bond, and, as such, to the proceeds of the ship; for the substitution of a new bottomry bond to himself in lieu of the bond to himself and Sharp was totally inoperative as between them. Whatever, therefore, Taylor has received for or on account of the freight or ship, appears to me to be clearly matter of account between him and the plaintiff; and that is all the original decree directs.

But Taylor, by his appeal, insists that the bill ought to have been dismissed; that is, that, after admission by him or proof of the joint purchase, the joint employment and the receipt by him of the fruits of such employment, and the exclusion by him of his co-partner, and appropriation to himself, or disposal in some way, without the authority of his co-partner, of the joint property, this court is to hold that it has no jurisdiction to cause justice to be done to the plaintiff. If this be so, it must be the result of some very stringent law; which leads to the consideration of the legal objection raised under the ship registry acts, and the alleged law upon that subject in the United States. And, taking the latter question *first, the law of the United States is [*816] a matter of fact to be pleaded and proved as any other fact upon which a defence is rested: but of this I have not had any proof. Assuming, however, the law to be as stated, the objection must be, that by such law Robertson alone can be recognized as having any interest in the ship in whose name, upon

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his affidavit of that fact, she was registered at Charleston. But this decree does not seek to enforce any title of the plaintiff against the title of Robertson. Suppose Robertson to have been sole owner, and that he remitted sums of money to Taylor on an account, in which, as between themselves, Sharp and Taylor were jointly interested, is this court precluded from entertaining any question between these two in respect of such remittances, because Robertson might in America have refused to make any such payments? Will the courts of this country refuse to administer justice between joint importers of any article of commerce upon proof that, in the production or exportation of such article, some fiscal law of the country of produce has been violated? During the French war the greater part of the foreign trade of this country was carried on in despite of the fiscal regulations of other countries, some of which were not at war with this country; and there are still instances existing of the same kind; but the parties to such transactions have not, upon that ground, been denied the ordinary administration of justice in matters growing out of such transactions. The cases do not support any such proposition. (See *Pellecat v. Angell*,^(a) and the cases there cited.) Besides, in the present case, there is not any regular evidence of the law of the United States upon this subject. The Vice-Chancellor Wigram does not appear to have given any weight to this objection as applied to the claim [*817] to freight, though *I collect that he did so as applied to the claim to the vessel itself. I will presently consider what ground there is for this distinction.

The next objection is that the plaintiff's claim is in violation of the English Ship Registry Acts. This must apply to the freight only, for as the ship never was registered as an English ship, the defendant, to support the objection at all, except as to the freight, must establish, that an English subject cannot by the law of England have any interest in a foreign ship; but as to freight the objection depends upon the English Navigation laws, which prohibit the importation into this country, for the purposes of consumption, of any produce of foreign countries, ex-

(a) 2 Cr. Mee. & Ross. 311.

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cept in ships of the country of produce, or in English ships; the objection being that the cargoes for which the freight was paid, having been imported in the ship in question, which, though registered in America, the plaintiff and the defendant Taylor claimed an interest in, such importation was contrary to the provisions of the law, and that no title can therefore be founded upon it. This assumes that the plaintiff and Taylor had some interest in the ship; and the plaintiff cannot, I think, in this suit, repudiate such claim. But the answer to the objection appears to me to be this,—that the plaintiff does not ask to enforce any agreement adverse to the provision of the act of parliament. He is not seeking compensation and payment for an illegal voyage: that matter was disposed of when Taylor received the money; and the plaintiff is now only seeking payment of his share of the realized profit. The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due; but, at most, an invasion of a parliamentary provision, supposed to be beneficial to the ship owners of this country; an evil, if any, which must remain the same, whether *the freight [*818] be divided between Sharp and Taylor, according to their shares, or remain altogether in the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defence by one against the otherwise clear title of the other? In this particular suit, can the one tenant in common dispute the title common to both? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that, in realizing it, some provision in some act of parliament has been violated or neglected? Can one of two partners, in any import trade, defeat the other, by showing that there was some irregularity in passing the goods through the custom house? The answer to this, as to the former case, will be, that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do, as between the parties. Do the authorities negative this view of the case? The difference between enforcing illegal contracts and asserting title to money which has arisen from them,

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is distinctly taken in *Tenant v. Elliot*,^(a) and *Farmer v. Russell*,^(b) and recognized and approved by Sir William Grant in *Thomson v. Thomson*.^(c) But the alleged illegality in this case was not in the freight being paid to English subjects claiming as owners of the ship, as in *Campbell v. Innes*.^(d) The importation of the goods in a ship American built, and not professing to have any English registry, would not be illegal, and the American owner might assign the freight to any one: assuming this to be so, I am of opinion that, under the authorities referred to, Taylor, who received the freight on account of himself and Sharp, cannot set up this defence to Sharp's claim. Upon [*819] these grounds, therefore, independently of the submission in the answer, this part of the decree is, I think, right.

With respect to the claim to the ship itself or the proceeds from the sale of it, notwithstanding the two reports upon it, there is not, in my opinion, sufficient information to enable the court to pronounce any judgment. It was upon this part of the case, as I am informed, that the Vice-Chancellor felt the difficulty arising from the navigation laws of the United States. I do not think it probable that this question ever will arise, although there will not be much difficulty in disposing of it if it should. From what does appear there can be but little doubt of the defendant Taylor having derived large pecuniary benefit from the disposition of the ship, which he has either received himself or had the benefit of in account with Messrs. Wood & Co. of New York, or with Mr. Robertson of Charleston, and possibly that he still holds the ship. All these facts must be ascertained before the court can adjudicate between the plaintiff and the defendant Taylor; and I shall be disposed to adopt any inquiries which the plaintiff may suggest for those purposes; for, seeing that, as between plaintiff and the defendant Taylor, they had a joint interest in the ship, and that Taylor ousted the plaintiff of all interference with it, and took upon himself the whole direction and disposal of it, this court will, I think, do its

(a) 1 Bos. & Pull. 3.

(b) 1 Bos. & Pull. 296.

(c) 7 Ves. 473.

(d) 4 B. & Ald. 496.

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utmost to restore the plaintiff to that position of which he has been so improperly deprived.

The plaintiff and the defendant appeal against the original decree; but that decree must, I think, be affirmed. The defendant's appeal contends that the bill ought to have been dismissed, for which, for the reasons I have before given, I think there is no ground. And the plaintiff appeals, because he contends that he "was entitled to more direct and immediate [*820] relief; but, in my opinion, the decree either gives or lays the foundation for the plaintiff acquiring all the relief he can be entitled to; and after the court has required information, and such information has been obtained, I cannot readily listen to a complaint that the court might have proceeded without such information, there being nothing in the inquiry which can improperly prejudice the real rights of any of the parties.

By the first report the Master answered the inquiries he was directed to make as to the accounts. But the inquiry as to the disposal of the ship itself, did not produce any information enabling the court to deal with that part of the subject, and consequently, by the order on further directions, further inquiries were directed. But I fear, that, unless some addition be made to such inquiries, another unproductive report may be expected: and it is certainly desirable that the information to be derived may exhaust the subject, and enable the court to dispose finally of the matters in contest between the parties.

I propose, therefore, after the inquiries directed as to the sale(a) to introduce these words,—“or otherwise in respect of the said ship: and, if no *bona fide* sale of the said ship shall be found to have taken place, then to inquire and state in whose possession and under whose direction and control the said ship has been since the 23d of September 1820, and now is; and in what manner she has since that time been used or employed, and what has become thereof: and let the Master also inquire and state what was the value of the said ship to be sold on the 19th of May 1840, the day on which “she left the [*821] port of Liverpool.” That was the time at which Tay-

(a) See p. 311.

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has assumed the exclusive possession and control of the ship in which Sharp was jointly interested with him ; and, if satisfactory information cannot be obtained as to the disposal of the ship, it will be to be considered whether justice may not be done to the plaintiff by the result of the last inquiry.

If the plaintiff chooses to go on with this decretal order as it stands, he can do so ; but if he thinks the additional inquiries I have suggested may be advantageous, I think he ought to have an opportunity of considering them. At present, by the decree of the Vice-Chancellor, the inquiry is merely as to the sale. We know so little about what did take place, or if any sale did take place, whether it was a *bona fide* sale or not, that it seems likely enough that that inquiry may produce nothing beneficial to the parties ; whereas what I have suggested will exhaust the subject, and furnish the court with complete information as to the mode in which the ship has been dealt with.

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ABSCONDING.

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ACCOUNT.

The equitable jurisdiction in matters of account is concurrent with that of courts of law, and no precise rule can be laid down as to the cases in which it will be exercised, this court reserving to itself a large discretion on the subject, in the exercise of which it will pay due regard to the nature of the case and the conduct of the parties, and will not restrain an action already commenced, merely on the ground that, from the number and complexity of the items in the account, a judge at *nisi prius* would urge the parties to refer it.

An injunction in such a case refused on the ground of delay; the bill not having been filed until six months after the action was commenced, and the injunction not moved for until another six months after answer, and when the cause was ready for trial. *North Eastern Railway v. Martin*, 758

See PAYMENT INTO COURT.

ACQUIESCENCE.

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ACTION.

The question in the case being, whether the plaintiff was entitled, under an agreement for a building lease, to a covenant for the use of a certain road, which he claimed, first, by contract as implied by the delineation of a plan in the margin of the agreement, and, secondly, on the ground of acquiescence, the court directed an action to try the alleged legal right first, reserving the question of acquiescence as a purely equitable one, and material only in case the legal right should be determined against the plaintiff.

The court will direct the defendant in equity to be plaintiff in such action, if by that means the right can be more conveniently tried. *Mott v. Blackwell Railway Company*, 632

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ADMINISTRATION AD LITEM.

The grant of letters of administration *ad litem* makes the grantee complete representative of the estate, to the extent of the authority which the letters purport to confer; and a decree obtained against such grantee is therefore binding upon any one who may afterwards take out general administration to the estate. *Dodge v. Chanter*, 845

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See **PRODUCTION OF DOCUMENTS**, 1, 3.**II. Of Title of Answer.**

Leave given to amend the title of an answer, although the application was opposed by the plaintiff. *Attorney-General v. Corporation of Worcester*, 3

III. At the Hearing.

An order made at the hearing of a cause in the court below, by which the plaintiff was allowed to amend his bill for the purpose of making a better case, but not to alter the prayer or go into new evidence, and the defendant was to be at liberty to put in a further answer, and examine witnesses, if necessary, in support thereof, was, upon appeal, discharged. And the practice generally, of allowing amendments at the hearing, except for the purpose of making the record complete as to parties, or, under particular circumstances, adapting the prayer to the case made and proved was reprobated as dangerous, and unwarranted by the established rules of procedure in courts of equity. *Watts v. Hyde*, 486

See **FAMILY ARRANGEMENT.****ANNUITY.**

Gift of an annuity of £300 to the testator's three daughters, and the survivors and survivor, with a gift over to the last survivor, of the sum set apart to answer the annuity. After the death of one of the daughters the fund set apart was lost

by the misconduct of the trustee, and the annuity remained unpaid for the rest of the lives of the other two: but after their deaths a sum of money, forming part of the residue, but of less amount than the original fund, becoming available. Held (reversing the original decision) that, as the last survivor had had no opportunity of receiving the capital during her life, the annuity was to be considered as continuing for her benefit, after her sister's death until her own, and, therefore, that she was entitled to an apportionment, in respect of the arrears of such annuity during that interval, as well as in respect of the principal fund. *Innes v. Mitchell*, 346

See **ISSUE**, 3.**ANSWER.**See **EVIDENCE.****PRODUCTION OF DOCUMENTS**, 3.**APOTHECARY.**

The right of an apothecary to charge for attendances, is not matter of law, but of contract, either express or to be implied from the usage of the place. *Smith v. Chambers*, 221

APPEAL.

1. The rule which prohibits an appeal for costs alone is confined to those cases in which the correctness of the decision as to costs cannot be judged of without rehearing the cause upon the merits, and therefore does not apply to a case in which the error of such decision is apparent on the face of the decree or order appealed from. *Chappell v. Purday*, 227

2. The Lord Chancellor will not hear a motion by way of appeal from an ex parte order pronounced by another branch of the court. *Sturgeon v. Hooker*, 289

3. Neither party to an issue directed by the court is precluded, by going to trial, from afterwards appealing against the order by which it was directed. *Butlin v. Masters*, 290

4. Where an objection for want of parties is allowed at the hearing of the cause, the plaintiff does not, by taking the usual order that the cause should stand over with leave to amend, preclude himself from ap-

peeling from the decision on the objection.
Davis v. Olesner, 545

5. The Lord Chancellor does not, by varying an order or decree upon appeal, take possession of the cause in its ulterior stages but subsequent proceedings go on in the Court below as if his Lordship's order had been made there. *Sewdon v. Marriott*. 623

See COSTS.
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ARREARS.

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AUCTION.

Where property is advertised to be sold "without reserve," such advertisement is understood to exclude any interference by the vendor, either direct or indirect, which can, under any possible circumstances, affect the right of the highest bidder, whatever may be the amount of his bidding, to be declared the purchaser; and any evasion of that engagement on the part of the vendor, being a violation of his contract with the public, will disentitle him to the aid of a Court of Equity to enforce the sale.

Therefore, where, previously to a sale of a life-interest, which was advertised to be "without reserve," the vendor entered into a private agreement with another person, that the latter should bid a certain sum at the auction, and be the purchaser at that sum, unless a higher sum were bid, a bill by the vendor for specific performance against a third party who had been declared the purchaser at the auction, though for a much higher price, was dismissed. *Robinson v. Wall*, 372

AWARD.

The Court of Chancery is one of the "Courts of Record" to which the stat. 9

& 10 W. 3, c. 15, gives summary jurisdiction for the enforcement of awards.

The statute excludes every jurisdiction to interfere with the execution of awards made under it, except the summary jurisdiction expressly given by it. And a bill will not lie to impeach an award made under the stat. whether the submission under which it was made has or has not been made a rule or order of court before bill filed. *Hemming v. Swinnerton*, 79

See JURISDICTION, 7.

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BOTTOMRY.

Semble. A bottomry bond given by the captain of a ship at a foreign port is not necessarily void, because there was time during the ship's stay at such port for the captain to have written home to his employers and to have received an answer: but, at all events, if the omission of the captain, under such circumstances, to communicate with his employers is intended to be relied on as invalidating the bond, it ought to be specifically charged in the bill, otherwise, although it appear in evidence, it will not be regarded. *Glascott v. Lang* 310

See FRAUD, 2. 4.
LIEN.

BREACH OF TRUST.

1. Where several defendants are involved in a breach of trust, the Court, in decreeing relief in respect of it, decrees the costs of the suit against them all, on the principle of giving the plaintiff the greater security for the payment, and without regard to the relative degrees of culpability in the defendants. *Lawrence v. Bowle*, 140

2. A. B. for whom land had been purchased by C. with a view to its being resold in building lots, on the land being conveyed to them, signed a paper writing pur-

pertaining to be a memorandum of an agreement between them relative to the land, by which it was agreed "that they should each advance half the purchase money and receive interest on the same at five per cent., and that they were to have each one-third interest in the purchase, and to reserve one-third of the profits arising therefrom for C., in lieu of his commission for purchasing, selling, surveying, valuing, and laying out the land in lots, or any other services that might be required of him; but that it was clearly and distinctly understood that C. should have no power or authority whatsoever over the land, and that he should not be entitled to receive any compensation therefrom until the whole was sold and paid for." The land having afterwards greatly increased in value, A. and B. refused to recognize C.'s interest in the speculation, and offered him a money compensation for his services. Whereupon C., who had objected, from the first, to the clause in the memorandum which excluded him from all control, as inconsistent with the original terms for which he had verbally stipulated, filed his bill for an immediate sale of the land. And the Court, being of opinion that the defendants, by repudiating the trust as to C.'s share, had devolved upon the Court the discretion which they had by the memorandum reserved exclusively to themselves as to the time of sale, declared C. entitled to one third, and referred it to the Master to inquire whether it would be for the benefit of all parties that the land should be sold. *Dale v. Hamilton*, 266

3. When one of several *cestui que trust* institutes a suit for relief in respect of a breach of trust, he is bound, in the conduct of the suit, to take care of the interests of the others as well as of his own. *Williams v. Powell*, 329

See MISREPRESENTATION.

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BROKER'S COMMISSION.

A broker, having taken an assignment of several cargoes in trust to sell them on their arrival, and out of the proceeds to repay himself the amount of his advances, took possession of some of the cargoes, and sold them under the power in the deed, while the rest were sold under an order made in a suit instituted by him to enforce his security, by which it was directed that they should be sold by him in such manner

and at such time as he and the receiver in the cause should agree, and, in the event of their differing, then as the Master should direct.

Held, that, in the latter sales, he was entitled to the usual commission allowed to brokers employed by the court: but, that, in the former, he was not entitled to any commission, having sold as trustee. *Arnold v. Garner*, 321

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CHARITY.

1 It is no criterion of the invalidity of a charity bequest that it is not capable of being administered in this court; for that is the case in every charity gift which is administered by the sign manual: but it is a criterion where the question is whether the gift be charitable or not.

A bequest of residue "to the Queen's Chancellor of the Exchequer for the time being, and to be by him appropriated to the benefit and advantage of my beloved country Great Britain," held to be a good charity bequest.

And, *semble*, that the selection of particular officer of the government as trustee marks the mode of application sufficiently to preclude the exercise of any discretion on that subject. *Nightingale v. Goulbourn*, 594

2. Where exhibitions are provided out of the surplus funds of a grammar school, none but boys who are objects of the charity ought to be eligible to them. Observations on the *Attorney-General v. The Earl of Stamford*, 1 Phill. 437. *Attorney-General v. Corporation of Ludlow*, 685

CHARITY TRUSTEES.

1. The court will not make an order for filling up vacancies in charity trustees, under the Municipal Corporation Act, unless it be satisfied that the existing number is practically insufficient, and that inconvenience arises from not having more. *In the Matter of Worcester Charities*. 294

2. Charity trustees appointed under the

§ 4 & 6 W. 4, c. 76, are invested by their appointment with all the rights and powers, as such trustees, which formerly belonged to the corporation or corporate officers for whom they are substituted. *The Attorney General v. The Corporation of Ludlow*

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life: Held (reversing the decision below) to be, in effect, a covenant to pay an annuity of 40*l.* until marriage, and afterwards an annuity of 90*l.* only; the proviso for reducing the annuity being part of the original gift itself, and not operating as a condition subsequent so as to be void as in restraint of marriage. *Webb v. Grace*, 701

CHARTER PARTY.

See *LIEN*.

COLLEGE STATUTES.

A provision in the statutes of a College that, among candidates for a particular Fellowship, those should be preferred who should be born nearest to a particular place: Held to be operative only in case of equality of merit.

Where by College statutes one of the qualifications of a Fellow, was, that he should be "in sacerdotio constitutus" before his admission, and the general practice of the college was to admit fellows elect on the expiration of a six months' probation from the time of their election, but the statutes prescribed no particular limit to the period of probation; an objection to an election, that the word "sacerdotium" meant the order of priesthood, and that the party elected was not, at the time of his election, old enough to be capable of taking even deacon's orders within six months, was overruled, it being held, 1st. That "sacerdotium" meant hold orders generally, and, 2dly, That the fellow elect might, either by a faculty from the Archbishop, or by an extension of the period of probation, which the college were willing to grant, procure deacon's orders within the necessary period. *In re University College, Oxford*, 591

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See *JURISDICTION*.

CONDITION IN RESTRAINT OF MARRIAGE.

A covenant to pay to E. C. during her life, subject to the proviso thereafter contained, an annuity of 40*l.*; the proviso being, that in case E. C. should at any time thereafter happen to marry, the annuity should thenceforth be reduced to 20*l.* only, which sum should in such case be paid and payable to E. C. from the time of her marriage for the remainder of her

CONFESSION.

Documentary evidence of confessions is not inadmissible merely because it is not specifically put in issue. *M'Mahon v. Burchell*, 127

See *EVIDENCE*, 2.

CONSERVATORS OF RIVERS

See *PARLIAMENT*.

CONSTRUCTION.

1. A sum of money was bequeathed in trust for several tenants for life in succession, with remainder to such person or persons as one of them, who was a married woman, should by will appoint, and, in default of such appointment, "to and for the benefit of her executors or administrators." The lady died without making any appointment. Held that her personal representative took the reversionary interest in the fund, not beneficially nor in trust for her next of kin, but as part of her estate. *Attorney-General v. Malkin*, 64

2. Illustration of the distinction between a direction in a will which goes to cut down or qualify a prior absolute gift, and one which only goes to regulate the mode in which such gift shall be dealt with and enjoyed. *Gemperts v. Gemperts*, 107

3. In construing limitations to a parent for life, and afterwards to his children, with a provision relating to survivorship annexed, whether occurring in wills or settlements, the rule for determining both the class who are to take and the contingency to which the survivorship refers is, to lean to that construction which will include as many objects of the gift as possible, consistently with the declared purpose of the author of the instrument. *Bouverie v. Bouverie*, 349

4. A gift to the testator's three sisters or their children as his mother should by deed

or will appoint. Held to be a gift, in default of appointment, to the whole class of the daughters and the children equally; not on the ground that "or" was to be construed "and," but that it was referable only to the power given to the mother, of selection from among the class, and that as the power had not been exercised, and the court could not assume the exercise of it, the whole class must take equally. *Penny v. Turner*, 493

5. A testator, by his will, directed that all his property should be "at the disposal of his wife for herself and children."

Held (reversing the decision below,) that there was no joint tenancy between the widow and children; but that the widow, though not entitled to the property absolutely, had a personal interest in it; and, as between herself and her children, was either a trustee of the fund, with a large discretion as to the application of it, or she had a power in favor of the children, subject to a life interest in herself. *Crockett v. Crockett*, 553

6. Instance of a constructive disposition of residue. *Hodgkinson v. Barrow*, 578

7. Construction of the words "heirs" and "family" as applicable to dispositions of real and personal estate respectively.

A testator directed that, upon the death of his wife, to whom he gave a life interest in all his property, both real and personal, his nephew, whom he named, should be heir to all his property not otherwise disposed of; but added, that, as he had had little intercourse with his nephew, and was apprehensive that his habits might require some control, whatever portion of the property might be possessed by him was to be secured by the executors for the benefit of his family. Held that the real estate was to be settled on the nephew for life, with remainder to his sons successively in tail male, with remainder to his daughters as tenants in common in fee; and the personal estate upon the nephew for life, with remainder to all his children as joint tenants, with a proviso that, in the event of all the children dying under twenty-one, and, if daughters, unmarried, or, if sons without issue, the personalty should be held in trust for the nephew. *White v. Briggs*, 583

8. Under a gift of residue to the testator's wife for life to her separate use, with an absolute power of appointing the principal by deed or will, and a gift, in default of such appointment, to her next of kin as in

case of intestacy: Held, that the gift of the principal had not lapsed by the death of the wife in the testator's lifetime, but that her next of kin, according to the statute, were entitled to the benefit of it. *Edwards v. Salway*, 635

9. A testator directed his executors to set apart a sum of stock to answer an annuity of 600*l.* to be paid to his daughter *Anna Maria* (who was then his only surviving child) for her life, and on her death to divide the principal among her children, if she should leave any, on their respectively attaining the age of twenty-four; if no child, or none who should attain that age, to pay thereout two small legacies, "and all the rest and residue of the said principal fund he gave and bequeathed to and amongst his heirs-at-law, share and share alike." And, in a subsequent part of his will, he appointed his said daughter by name his general residuary legatee. Held, nevertheless, that as sole heiress-at-law and next of kin of the testator at the time of his death, she, and not his heirs-at-law or next of kin at the time of her death, was entitled, under the ultimate gift, to the fund set apart to answer the annuity. *Ware v. Rowland*, 635

10. A will not affected by the 1 W. 4, c. 40, commenced as follows:—"I give, devise, and bequeath all my estate, real and personal, to W. E., his heirs, executors or administrators, to and for the uses, intents, and purposes following." Then followed certain declarations of trust, but which were applicable only to particular portions of the personal estate, and the will concluded by appointing W. E. sole executor. Held (reversing the decision below,) that W. E. took the residue as trustee for the next of kin.

Observations on the conflicting opinions of Sir W. Grant and Lord Eldon in *Dawson v. Clark* (15 Ves. 409, and 18 Ves. 227,) and the opinion of Lord Eldon confirmed. *Mapp v. Elcock*, 793

See COLLEGE STATUTES. PARLIAMENT.

CONTEMPT.

After a petition had stood over at the request of the Respondent's counsel for his convenience, the petitioner incurred a contempt, which he had not cleared when the petition came on again. Held, that he was nevertheless entitled to be heard. *Brixtowe v. Needham*, 190

CONVERSION.

Part of a testator's residuary estate consisted of a bond debt, which, owing to the insolvency of the debtor's estate, was not recovered until many years after the testator's death, when the gross sum recovered in respect of principal and interest did not equal the amount of the original debt. Held that, as between the tenant for life of the residue and those in remainder, the former was not entitled to receive what had actually been recovered in respect of interest, but only the amount of interest at 4 per cent. on the sum which the bond would have realized if the debtor's estate had been administered at the end of a year after the testator's death. *Turner v. Newport*, 14

CORPORATION.

I. Municipal.

The proper style of municipal corporations in cities is "the Mayor, Aldermen, and Citizens," and not "the Mayor, Aldermen and Burgesses" of the city. *Attorney-General v. Corporation of Worcester*, 3

II. Trading.

A demurrer to a bill by one of the shareholders of an incorporated mining company on behalf of himself and all the other shareholders except the members of the governing body, who were defendants, impeaching several transactions of that body, which it appeared had been sanctioned by majorities at general meetings of the shareholders, and amongst which was a project to vest all the property of the company in trustees for the purpose of liquidating its affairs, was allowed, notwithstanding some vague and general charges of fraud and misconduct on the part of the defendants, and an allegation that, by the constitution of the company, no one but the governing body could convene a general meeting; the specific acts complained of not being clearly such as, in the opinion of the court, it was incompetent to a majority of shareholders to sanction.

The doctrine of *Foss v. Harbottle* (2 Hare, 492,) and *Moxley v. Alston* (1 Phill. 70,) as to the interference of this court in the internal administration of incorporated companies, confirmed. *Lord v. The Governor and Company of Copper Miners*, 740

COSTS.

1. Where a suit is instituted by some of
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a class of persons on behalf of all, those individuals of the class only who are actually named as parties to the record, are responsible to the defendants for costs.

And, therefore, in a suit by some on behalf of all of the guardians of the poor of a parish against a party alleged to be a defaulter to the parish funds, held, that a person who had been a guardian at the commencement of the suit, and one of the committee of guardians who authorized it, but who was not actually named as a party to the record, was a competent witness for the plaintiffs, notwithstanding his liability, as between himself and the other guardians, to contribute to the costs of the suit; such liability being one which could not be enforced in that suit, and his incompetency, by reason of interest as a rate payer, being removed by the statute 3 & 4 Vict. c. 26. *Pascall v. Scott*, 390

2. Where, after the trial of an issue directed by the court below, the party who failed appealed from the order directing it, the Lord Chancellor, in reversing the order and directing a new issue, refused the other party the costs of the appeal, but reserved them. *Parker v. Morrell*, 453

3. If the nature of the case be such as to render costs a matter of discretion with the court, the mere circumstance that they form part of the relief specifically prayed by the bill does not make them a substantive matter of appeal from the decree. *Lancashire v. Lancashire*, 657

4. The costs of an issue directed on an interlocutory application may be disposed of after the issue is decided without waiting for the hearing of the cause. *Malins v. Price*, 2 Coll. 190, over-ruled. *Duncan v. Varty*, 696

5. A party served with a petition does not forfeit his right to the costs of his appearance merely because his counsel at the hearing has raised an unsuccessful opposition to the prayer. *In re London and South Western Railway Company*, 772

6. The trusts of a mixed residuary gift of real and personal estate having failed, the costs of a suit by the next of kin claiming the whole, on the ground that the real estate was converted out and out, were apportioned between the real and personal estate, although the title of the heir to the land was held to be so clear, that the court adjudged it to him in the absence of some of the next of kin. *Christian v. Foster*, 161

7. A bill filed for redemption of a mortgage, and an injunction to restrain a sale under a power alleged to have been fraudulently inserted in the deed, contained various charges of oppression and misconduct against the defendant, on the ground of which it prayed that he might pay the costs of the suit: on a motion for an injunction supported by affidavits of those charges, the defendant submitted to an immediate account, the plaintiff undertaking to pay what should be found due, and further directions and costs were reserved. Held, on a subsequent hearing of the cause for further directions, that the affidavits filed on the former occasion could not be read, the first order having shut out all the merits except the account. And an order giving the plaintiff the costs of the suit on the ground of those affidavits, was, on appeal, dismissed, and the defendant was allowed his costs according to the ordinary rule. *Dustin v. Patterson*, 341

See APPEAL.

BREACH OF TRUST, 1.
CREDITOR'S SUIT, 3.
ERROR APPARENT.
GRATIS APPEARANCE.
INTERLOCUTORY REFERENCE.
IRREGULARITY, 1.
LUNATIC MORTGAGEE.
NEXT FRIEND.
PARLIAMENT.
STAY OF PROCEEDINGS.
SUBSTITUTED SERVICE.
WILFUL NEGLIGENCE.

COUNSEL.

If one of two plaintiffs appears in person, the other cannot be heard by counsel; for co-plaintiffs cannot sever, nor can the same party be heard both in person and by counsel. *Newton v. Ricketts*, 624

COURT OF RECORD.

See AWARD.

COVENANT.

See EQUITABLE MORTGAGE.
JURISDICTION, 6.

CREDITOR'S SUIT.

1. The Court will not, on the ground of irregularity in a decree in a creditor's suit, take the conduct of the suit from the

plaintiff and give it to another creditor, though collusion be suggested.

Where decrees had been obtained in two creditors' suits for the administration of the same estate, the Court ordered that the plaintiff in the suit in which the second decree had been made, should be at liberty to attend the proceedings under the first decree; but, on the ground that he was a stranger to that suit, refused to give him the conduct of it. *Smith v. Guy*, 159

2. Tenant for life, of estates decreed in a creditor's suit to be sold for payment of debts, is a trustee for the purchaser within the meaning of 1 Wm. 4, c. 60, s. 18. *In re Milfield*, 254

3. The usual direction in decrees in creditors' suits, that the creditors shall, before they are admitted, contribute their proportion to the expenses of the suit, does not prevent the Court, on further directions, if the case warrants it, from ordering the plaintiff to pay all the costs of the suit. But if the suit be any thing more than a mere creditor's suit, the direction for contribution ought to be limited to the costs of that part of the suit in which all the creditors have a common interest with the plaintiffs. *Dunning v. Harde*, 294

See EVIDENCE, 3.
INJUNCTION, 1

DECLARATION OF RIGHT.

See INJUNCTION, 7.

DECREE.

I. Entering Evidence in.

1. Where an objection to evidence at the hearing of a cause is allowed, the tender of the evidence and its rejection ought to be expressly recited in the decree, and the evidence ought not to be entered as read. *Watson v. Parker*, 5

2. Every decree, though it merely directs inquiries, ought to contain a statement of the evidence on which it is founded: and therefore a decree reciting that certain evidence had been read, but that both parties consented that the entry of it should be without prejudice to its admissibility, and thereupon directing certain inquiries, was held to be irregular. *M'Mahon v. Burchell*, 127

3. Every decree, although it only direct issues or inquiries, ought to recite the

evidence on which it is founded, and therefore, where evidence is tendered and objected to, the Court ought to decide at once upon its admissibility, and not to allow it to be entered as read *de bene esse*. *Parker v. Morrell*, 453

II. Special Inquiries.

Where the answer to a bill for an account sets up a counter claim, as to which it is doubtful whether it would or would not be available to the defendant as an item of discharge under the general account directed by the decree, the Court, as the safer course, will make it the subject of a special inquiry. *Lord v. Wightwick*, 10

See INQUIRY.

III. Special Directions.

A party sued as executor *de son tort* jointly with the rightful executor, stated, by his answer, that he had, before the bill was filed, accounted for his receipts and payments to his co-defendant and paid over to him the balance: Held, that such settlement would not be binding on the plaintiff who was beneficially interested in the estate, and therefore the Court refused to insert in the decree the usual direction as to not disturbing settled or stated accounts.

Such a direction is applicable only to an alleged settlement of accounts between plaintiff and defendant and not to one between co-defendants. *Carmichael v. Carmichael*, 110

DEMURRER.

It is no ground of demurrer by one Defendant that a co-Defendant appears by the bill to have no interest. *Roberts v. Roberts*, 534

See DISMISSAL OF BILL.
GENERAL ORDERS, 3.
PARTIES.
PERSONAL REPRESENTATIVE.

DEPOSITIONS.

See PERPETUATION OF TESTIMONY.
WILFUL NEGLIGENCE.

DISCOVERY.

See GENERAL ORDERS, 4.

DISMISSAL OF BILL.

Semble. After a general demurrer to a bill has been over-ruled on argument, the plaintiff is not entitled as of course to an order dismissing his bill with costs. *Cooper v. Lewis*, 178

ENLARGING TIME.

See FORECLOSURE.

ENROLMENT.

To prevent the enrolment of a decree, the order for setting down the cause to be reheard must be actually served, and notice of its having been made is not sufficient. *Groom v. Stinton*, 384

See FORECLOSURE.

EQUITABLE MORTGAGE.

An equitable mortgagee, by deposit, of a lease is not compellable in equity, at the suit of the lessor, to take a legal assignment of the lease, although he may have entered into possession of the premises and paid rent. Nor, *semble*, is he liable to the lessor upon the covenants, there being no privity between him and the lessor until he has made himself legal assignee. *Lucas v. Comerford* (3 B. C. C. 166,) overruled. *Moore v. Greg*, 717

EQUITABLE WASTE.

The statutory rule which gives to a remainderman twenty years from the time when his title accrues in possession, for bringing an action or suit for the property, applies to a claim for compensation for equitable waste, as well as to a claim to the land itself. And therefore an account of equitable waste was decreed against the estate of the tenant for life thirty-eight years after the waste was committed, the title of the plaintiff, as remainderman in tail, having accrued within twenty years before the filing of the bill.

Upon a claim to compensation for equitable waste, the Court does not consider whether the act complained of was or was not a sound exercise of discretion with reference to the state of the property and to the interests of the family to which it belongs, for a tenant for life has no right to alter the nature of property belonging to another person.

Distinction between acquiescence and the

release of a right. *Duke of Leeds v. Lord Amherst*, 117

ERROR APPARENT

Where a bill to restrain an alleged infringement of a copyright is retained, at the hearing, with liberty to the plaintiff to bring an action, and the action is accordingly brought and fails, it is of course that the bill should be dismissed with costs, and, therefore, if dismissed without costs, it is error on the face of the decree. *Chappell v. Purday*, 227

See APPEAL.
PLEADING, 4.

ESTABLISHING WILL.

In a suit for specific performance by a vendor whose title was derived under a suspicious will, it appearing that the heir had failed in an action of ejectment, and afterwards in a motion for a new trial, the Master reported in favor of the title, and the Vice-Chancellor confirmed the report, and decreed specific performance without requiring the plaintiff to establish the will. But the Lord Chancellor, on appeal, reversed that decision, holding that it was more consonant to the principles of this Court that the validity of the will in such a case should be conclusively determined, if possible, between the vendor and the heir, than that it should be left to be litigated between the heir and the purchaser after the purchase money should have been paid. *Grove v. Bastard*, 619

EVIDENCE.

1. In pedigree cases an old will, by which the testator purports to leave all his property to collateral relations or friends, is regarded as very strong evidence of his having died without children. *Hungate v. Gascoyne*, 25

2. An answer put in by one of several partners, after dissolution of the partnership, containing an admission of a representation having been made by such partner in a partnership transaction, prior to the dissolution, held not to be admissible as evidence of such admission against his co-partners, on the ground that since the dissolution of the partnership the party whose answer it was had become bankrupt and obtained his certificate, and had therefore at the time of putting in the answer no common liability with the co-partners:

Held, also, that even independently of that objection, such answer would not have been admissible in evidence, though made in the existing suit, without other evidence to identify the party whose answer it was with the partner. *Parker v. Morrell*, 453

3. On the rehearing of a creditor's suit, in which the plaintiff claimed as assignee of a deed of covenant alleged to have been executed by the testator, it appearing, from the evidence of one of his own witnesses, that the benefit of the deed, which was not forthcoming, had been assigned to him without consideration, for the express purpose of qualifying the covenantor to be a witness to prove its contents, and the plaintiff having failed in the due preliminary proof of the execution of the instrument and of its loss, the Lord Chancellor reversed the decree of the Court below, by which certain inquiries were directed as to these points, and retained the bill with liberty to the plaintiff to bring an action.

Semble. If the execution and loss of the deed had been duly proved, the covenantor would have been a competent witness to prove its contents, as he swore positively on his cross-examination that the assignment was absolute, and that he had no personal interest in the suit, and the suit being for payment out of assets in a course of administration, and therefore not brought here solely for the purpose of changing the jurisdiction. *Watson v. Parker*, 5

EXAMINATION OF PARTIES.

1. The practice of allowing the parties, on the trial of an issue, to be examined for themselves, is in the discretion of the court, but to be resorted to with great caution, and never unless under the peculiar circumstances of the case justice could not be attained without it: and certainly never when, from the position of the parties, an unfair advantage would be given by it to one over the other. And, therefore, where it appeared that the transaction to which the issue related had occurred in the presence only of the plaintiff and one other party, who, being a late partner of the defendants, was since dead, an order of the court below directing that each party to the issue should be at liberty to be examined for himself, was reversed on appeal, as calculated to give the plaintiff an unfair advantage. *Parker v. Morrell*, 453

2. The rule that a plaintiff cannot be examined as a witness in the cause is an absolute rule of practice, not depending on the question whether in the particular case

he may or may not be liable for costs.
Fisher v. Fisher, 236

EXCEPTIONS.

Every exception to a report ought to tender some proposition on which the court may decide.

The simple allowance of an exception by the court, unaccompanied either by an express declaration or a reference back to the Master implies an adoption by the court of the proposition tendered by the exception. *Stocken v. Dawson*, 141

See TITLE.

"EXECUTORS OR ADMINISTRATORS."

See CONSTRUCTION, 1.

EXECUTORS.

See STAY OF PROCEEDINGS, 5.
SUBSTITUTION OF SECURITY.
WILFUL NEGLECT.

EXECUTORY TRUST.

See CONSTRUCTION, 7.
HEIRLOOMS.
POWER, 2.

EXHIBITIONS.

See CHARITY, 2.

FALSE IMPRISONMENT.

See PRACTICE.

"FAMILY."

See CONSTRUCTION, 7.

FAMILY ARRANGEMENT.

Circumstances to be taken into consideration in judging of the fairness of an arrangement between a father, tenant for life, and son, tenant in tail for barring the entail.

Where the main consideration moving from the son was an undertaking to pay the father's debts, even the circumstances of several of the most important items be-

ing left in blank was held insufficient to set the transaction aside, as against the father, though the son was only just of age; as a family arrangement of that description cannot be supposed to have depended upon any very exact calculation as to the amount of the debts.

An agreement between a father, tenant for life, and an eldest son, tenant in tail, for certain considerations, to bar the estate to the son, was followed within a fortnight by the sale of the estate by the son to the solicitor who had acted for both parties in the agreement. In a suit after the death of the son without issue, by the next remainderman in tail, who was also heir-at-law of the son, to set aside both transactions, and to have the estates resettled to the former uses, the court was of opinion upon the evidence that both transactions were but parts of one scheme, contrived by the solicitor for his own benefit; but being also of opinion that, on the principle of family arrangements, the agreement between the father and the son was not necessarily an unfair one in itself, the court set aside the second only, and, dismissing the bill as to the first, decreed the solicitor to convey the estate to the plaintiff in fee.

On a bill being subsequently filed by the father against the plaintiff in the former suit, complaining, that since he had got into possession of the estates under that decree, he had refused to perform the stipulations in the father's favor of the first agreement, and praying specific performance thereof; the Vice-Chancellor being of opinion at the hearing that the plaintiff had no equity for such relief, but that he had a right to be restored as far as possible to the condition in which he stood at the time of that agreement, gave him leave to insert, by amendment, an alternative prayer for relief of that kind; and on the amended record directed certain inquiries on that footing, conceiving that such decree was not inconsistent with that in the former suit. But, on appeal by the plaintiff, the Lord Chancellor held the contrary, and that, whether the present plaintiff was or was not entitled originally to enforce the first agreement, the present defendant, by taking a conveyance of the estate under the former decree, had waived any equity he might have had to resist such a claim; and his Lordship made a decree for specific performance, at the same time disapproving of the order for amending the prayer which had not been appealed from. *Bellamy v. Sabine*, 425

FALSEHOOD.See **ILLEGAL CONTRACT.****FELLOWSHIP.**See **COLLEGE STATUTES.****FIDUCIARY RELATION.**See **PRINCIPAL AND AGENT.****FORECLOSURE.**

The enrolment of an order absolute of foreclosure does not, any more than an enrolment of the decree of foreclosure, preclude the court from again enlarging the time in a proper case and upon the usual terms. *Ford v. Wastell*, 591

FOREIGN COURTS.See **PREPARATION OF TESTIMONY.****FOREIGN LAW.**See **ILLEGAL CONTRACT.****FOUR DAY ORDER.**See **RECEIVER, 2.****FRAUD.**

1. A bill founded on an imputation of fraud and personal corruption will not warrant an inquiry, on that case being disproved, whether there has not been neglect or an omission of duty. *Ferraby v. Hobson*, 255

2. If a bill makes a case of actual fraud, and, at the hearing, the fraud is disproved or not established, the court will not in general allow the bill to be used for any secondary or inferior kind of relief to which the plaintiff might otherwise have been entitled, but will dismiss it at once.

But, where a bill sought to set aside a bottomry bond, as having been concocted in a fraudulent conspiracy between the captain of the ship and the obligee, though the fraud was disproved at the hearing, the court, at the request of the defendant, directed the usual inquiries, for the purpose of ascertaining how much of the sum

secured by the bond was a proper subject of bottomry. *Glascott v. Lang*, 310

3. *Semble*. If a fraud has been practised on a tenant in tail, which has been carried into effect by means of a recovery, and the tenant in tail dies without issue and without confirming the transaction, the next remainder-man in tail may maintain a bill to set it aside. *Sacus*. If the recovery were suffered with the intention of barring the entail, and the fraud applied only to some part of the transaction independent of that object.

If an arrangement between two parties is, on general principles, fair as between them, it is not invalid merely because it may have been concocted and brought about by a third party with a fraudulent intention of benefiting himself.

In such a case, so far as regards the third party, the whole may be looked upon as one transaction, in order to judge of his motives and to put a construction upon his acts; but, as regards the other two, who, though affected by one part of the transaction, may be total strangers to the other part, it is not only not necessary, but it would be unjust, to consider every part of the transaction affected by objections which, in fact, apply only to particular portions of it.

Where a young man, just of age, was imposed upon in the sale of an estate, Held, that his heir was not precluded from suing to set the sale aside by the circumstance of the party defrauded having, by will, bequeathed to a third party the balance of purchase-money remaining due at his death.

The principle of there being no equity as between real and personal representatives, has no reference to such a case; in which the court proceeds upon the ground that, as the transaction ought never to have taken place, the rights of the parties are, as far as possible, to be placed in the situation in which they would have stood if there had never been any such transaction. *Bellamy v. Sabine*, 425

See **FAMILY ARRANGEMENT.**
JURISDICTION, 4.
MISREPRESENTATION.

GENERAL ORDERS.

May, 1849.

1. Where a writ of *fi. fa.* issued under the General Order of May, 1839, has failed to satisfy the demand, another writ may issue into another county. *Spencer v. Allen*, 215

2. An application by a sheriff who, in the execution of a *fi. fa.* for costs under the order of May 1839, had seized goods which were claimed as the property of third parties, to be protected from an action, and that the claimants might come in *pro interesse suo*, refused: the sheriff not being, like a sequestrator, an officer of this court, and the protection given to him by the Interpleader Act being confined to execution of process at law. *Rock v. Cook*, 691

XXXVIII. August, 1841.

3. A defendant cannot, under the 38th Order of August, 1841, decline to answer any interrogatory, merely on the ground, that the bill is open to a general demurrer. *Mason v. Wakeman*, 516

XII. May, 1845.

3. A bill of discovery is not within the 12th Order of May 1845, unless it be a cross bill in aid of a defence to an original bill. *Heming v. Dingwall*, 212

XXXI. May, 1845.

5. When a party against whom a judgment had been recovered, had taken advantage of a stay of execution to convert all his property into money and go abroad, after notice from the creditor that he intended to file a bill to enforce the judgment against his real estate as soon as the interval required for that purpose by the statute 1 & 2 Vict. c. 110, should have expired. Held, on such bill being filed accordingly, that the defendant was to be considered as having absconded to avoid process in this suit, and, therefore, at all events, within the 31st Order of May, 1845.

But *semble*. If it had appeared that he had gone abroad within two years before the filing of the bill, to avoid process generally, that would have been sufficient within the meaning of the order. *Cope v. Russell*, 404

XXXIII. May, 1845.

6. An order for leave to serve a party abroad is not irregular on the face of it, merely because the affidavit on which it was obtained states only the place of the party's residence without any other circumstances to warrant the order. *Blenkinsopp v. Blenkinsopp*, 1

XXIX. and XXXIII. May, 1845.

7. Where, in a suit against a husband and wife, the husband fails to enter an ap-

pearance for the wife, an appearance may be entered for her by the plaintiff under the 27th or 33d Orders of May 1845, on proof of the subpoena having been duly served upon the husband only. *Steele v. Plomer*, 780

LVI. May, 1845.

8. Leave given to serve a traversing note on a defendant for whom the plaintiff had entered an appearance, though the case was not within the 56th Order of May, 1845, which authorizes such service only on a defendant who defends either in person or by a solicitor. *Moss v. Buckley*, 638

LXXXI. May, 1845.

9. The notice required by the 88th Order of May, 1845, does not apply to proceedings for appointing a receiver, but only to his taking possession of the estates when appointed. *Dresser v. Morton*, 285

GOOD FAITH.

See IRREGULARITY

GRAMMAR SCHOOL.

See CHARITY, 2.

GRATIS APPEARANCE.

On the hearing of an appeal presented by a defendant, the court having intimated that a question included in it, relating to costs, could not be gone into in the absence of co-defendants who had not been served, counsel were, in the course of the argument, instructed to appear for them gratis. But the Lord Chancellor refused to sanction such an appearance, and disposed of the case as if they had not appeared. *Attorney-General v. Gibbs*, 327

GUARDIAN.

See PRÆCATORY WORDS.

HABEAS CORPUS.

Returns to writs of habeas corpus, when disposed of, are to be sent to the Record Office, and not to be redelivered to the officer who made them. *Oldfield v. Cobbett*, 289

"HEIRS OR FAMILY."

See CONSTRUCTION, 7, 9.

HEIRLOOMS.

A direction annexed to a bequest of chattels that they shall go as heirlooms, although accompanied by a direction to the executors to make an inventory of them, does not render such bequest executory, or give to a Court of Equity any power to modify the legal effect of the bequest, whatever that may be; the rule, though disapproved, being too firmly settled by modern decisions, overruling the contrary doctrine of Lord Hardwicke, to be now disturbed. *Rowland v. Morgan*, 764

HUSBAND AND WIFE.

See GENERAL ORDERS, 7.

INFANT.

SEPARATE PROPERTY.

STAT OF PROCEEDINGS, 4.

ILLEGAL CONTRACT.

Illustration of the distinction between enforcing illegal contracts and asserting title to money which has arisen from them.

The courts of this country will not refuse to administer justice between joint importers of any article of commerce merely upon proof that, in the production or exportation of such article, some fiscal law of the country of produce has been violated.

One of two parties who has possessed himself of the property of the firm cannot be allowed to retain it by merely showing that, in realizing it, some provision of some act of parliament has been violated or neglected.

A. and B., British subjects, purchased and repaired an American built ship, on a joint speculation, with a view to employing her in the trade between the two countries, until an opportunity should occur for reselling her to advantage; for which purpose they procured her to be registered in the United States in the name of C., a citizen of that country, upon a false declaration that she was *bona fide* the sole property of C. After the ship had made several voyages, B., who had had the management of her, attempted to exclude A. from his share in the speculation, and, in spite of the dissent of A., sent her on another voyage to America. Held, that, even supposing the declaration above-mentioned and the registration thereby effected to have

been a fraud upon the American law, and the subsequent employment of the ship so registered to have been a fraud upon the English navigation Laws, such fraud would not prevent A. from maintaining a suit against B. for an account and payment of his share of the *realized* profits of the speculation. And in decreeing such account, the court also directed an inquiry what had become of the ship since she was sent on her last voyage, and what was her value when so sent, with a view to making B. personally liable for such value in case either the ship or the proceeds of her sale should not be ultimately forthcoming. *Sharp v. Taylor*, 801

INFANT.

1. The cases in which this court interferes for the protection of infants are not confined to those in which there is property.

The Court may make an order for the delivery of an infant to the party who ought to have the custody of it, on petition, as well as under the general jurisdiction upon habeas corpus.

A husband, whose wife had three years before absconded with his infant children, applied for an order, that the wife's brother, who had assisted in her escape, and had since transmitted to her the income to which she was entitled under her marriage settlement, of which he was trustee, might either produce the children or disclose the place of their concealment, or at least discontinue the transmission of the income. On an affidavit of the brother, that the children were not in his custody or under his control, the order was refused. *In re Spence*, 247

2. Where, upon an application by a wife who had obtained a sentence of divorce against her husband for the custody of her children, the conduct of her husband appeared to be such as clearly to render it improper that he should have the custody of the eldest child, a girl of eleven years old, the court made an order for the delivery of all the children (two of whom were under seven years of age) to the mother, holding it unnecessary to consider whether it would have made the same order with respect to the second child, who was a boy of nine years old, if his case had stood alone, as the effect of the children being brought up in different custodies would be likely to create factions in the family.

The object of the custody of Infant's Amendment Act (2 & 3 Vict. c. 54.) was to enable married women who should be ill-treated by their husbands, to assert their

rights as wives, without being restrained by the fear of being separated from their children; for which purpose the Court of Chancery is invested by the Act with a discretionary power, which, by its inherent jurisdiction, it did not possess, of interfering with the common law right of a father to the custody of his children, such power varying in extent according as the children are under or above seven years of age. *Warde v. Warde*, 786

INJUNCTION.

1. The Court will not restrain a creditor from prosecuting his legal remedy against the personal representatives of his debtor, unless there is a decree under which the creditor has a present right to go in and prove his debt. *Rankin v. Harwood*, 22

2. An application for an injunction to restrain an alleged breach of covenant had been once ordered to stand over until the decision of two legal questions raised by the defendant. On those questions being decided in the plaintiff's favor, and the motion coming on again, the defendant raised a third legal objection, and the court below, at his request, directed a case to be stated for the opinion of a court of law upon it, but, on the ground of the delay in bringing it forward, granted an injunction in the mean time. On appeal, however, the Lord Chancellor dissolved the injunction, notwithstanding that circumstance, on the ground of the much greater facility of indemnifying the plaintiff than the defendant, according as the one or the other might succeed at law.

3. Where the interference of the Court by injunction depends upon a legal right which is disputed, the Court ought, for its own security, to put the matter into a course for ascertaining that right; and if that is to be done by sending a case for the opinion of a court of law, this court ought not to leave it to the option of the defendant, but ought itself to direct a case to be prepared, with a reference to the Master to settle it, in case the parties differ. *Rigby v. The Great Western Railway Company*, 44

4. The jurisdiction of the Court to restrain by injunction an act which the defendant is by contract bound to abstain from, is not confined to cases in which there are either no executory terms in the contract, or none which a Court of Equity has not the means of enforcing.

If a bill states a right or title in the plaintiff to the benefit of a negative agreement on the part of the defendant, or of his abstaining from a given act, the Court

will equally interfere by injunction, whether the right be at law or under an agreement which cannot be otherwise brought under its jurisdiction. *Dietrichsen v. Cabburn*, 52

5. Principles which ought to regulate the exercise of the jurisdiction by injunction. *Spottiswoode v. Clarke*, 154

6. The circumstance that a party is commencing operations avowedly for a purpose which another conceives to be injurious to him and illegal, does not warrant the latter in applying for an injunction, unless the circumstances of the case, at the time when the motion is made, are such as to enable the Court either to form its own opinion as to the legality of the meditated purpose, or to put that question into a course of immediate trial; and, therefore, where that is not the case, the motion will not be allowed to stand over till the purpose has been so far executed as that its character may be judged of, but will be at once refused. *Haines v. Taylor*, 209

The Court will not, generally, in doubtful cases restrain by injunction the infringement of an asserted legal right, until its validity has been established by an action at law: but, *secus*, where there has been long uninterrupted enjoyment under a patent, that being regarded as *prima facie* evidence of title.

When the Court grants an injunction, the order ought not merely to direct that an action shall forthwith be brought, with liberty to the parties to apply in case of delay, but to give such directions of its own, in the first instance, as will insure the speedy trial of the action.

An injunction granted pending an action to be brought by the plaintiff, for the speedy trial of which special directions were given, was dissolved on the ground, of the plaintiff not having duly complied with these directions. *Stevens v. Keating*, 333

7. Where the matter in dispute is distinctly raised by a motion for an injunction, and is ready for decision, the right should be declared and the injunction founded upon such declaration, that the order may inform the defendant what the opinion of the court is as to the limits of his right, *Cothor v. Midland Railway Company*, 469

8. *Semble*. This court will not restrain a creditor of a joint stock company from enforcing payment of his debt against an individual shareholder, on the ground merely that the creditor is himself a shareholder,

and therefore liable to contribute, as such interference would defeat the rule at law, which, for convenience, enables creditors of such companies to recover their debts by that form of proceeding. *Rheam v. Smith*, 726

See INTERPLEADER.
SPECIFIC PERFORMANCE, 2.
SUPPLEMENTAL ANSWER.

INQUIRY.

1. Where at the hearing of a cause an inquiry is directed, founded on a suggestion in the answer, it ought to be strictly limited to the specific case suggested.

Where an answer suggested that the plaintiff had for a certain time occupied a house of which he was tenant in common with several others, and that by virtue of such occupation rent became due from him to those parties, and the bill was thereupon amended by charging that the plaintiff's occupation was not exclusive, and no further answer was put in. Held, that that suggestion did not warrant an inquiry whether the plaintiff had been in occupation of the premises during any and what time, and, if so, whether he ought to be charged with any and what sum in respect of such occupation.

The executor of A. being sued for payment of a legacy, set up as a defence that the plaintiff had for several years occupied a house, part of an estate of which he and A., and other persons, were tenants in common under the will of B., and that A.'s share of the rent due from the plaintiff in respect of such occupation exceeded the amount of the legacy. *Semble*, the court will not in a suit so framed direct inquiries as to the plaintiff's liability for rent, or as to the amount due from him to A.'s estate in respect thereof, although the other parties interested in such inquiries be willing to be bound by them, but will decree immediate payment of the legacy in question without reference to the counter-claim. *M'Mahon v. Burchell*, 127

2. Observations on the importance of confining inquiries, directed by a decree, strictly to the issue raised by the case upon the pleadings. *Bellamy v. Sabine*, 426

See DECREE, 2.
FRAUD, 2.
INTERPLEADER.

INSOLVENT.

See JURISDICTION, 3.

INTEREST.

Where a decree or order under which money has been paid is reversed on appeal, the money is in general ordered to be repaid without interest. *Parker v. Morrell*, 453

INTERLOCUTORY REFERENCE.

Upon a reference to inquire whether it was for the benefit of infants in whose name a suit had been instituted, that the same should be prosecuted, the Master reported that it was, and exceptions to his report were overruled; but a petition to confirm the report, and for payment by the defendant of the costs of the reference, was, by the court below, ordered to stand over till the hearing of the cause. Held, on appeal, that such an order was contrary to the practice, and it was discharged, and an order made according to the prayer of the petition. *Raven v. Kerl*, 692

See INTERPLEADER

INTERPLEADER.

It is irregular in an interpleading suit to direct any inquiries as to the conflicting claims of the defendants until the answers of all of them have been put in.

Where an injunction has been granted in an interpleading suit, all the defendants are interested in it, and all ought therefore to be served with notice of a motion to dissolve it.

On a motion to dissolve an injunction in an interpleading suit, an order was made directing an inquiry as to the title of the defendant who moved, but with respect to the co-defendant, who had not answered and did not appear upon the motion, only directing an inquiry whether he had made a claim. After the Master had made his report and the Court had pronounced its final order, the order of reference was discharged and the consequential proceedings set aside at the instance of the plaintiff, on the ground—1st, that the order was irregular in not reciting an affidavit of service on the absent defendant. 2ndly, That it was contrary to the practice to direct any inquiry as to the title of the defendants until the answers of all of them had come in; and 3dly, That the inquiry actually directed was defective, in not extending to the title of the absent defendant as well as to that of the other. *Masterman v. Lewis*, 182

IRREGULARITY.

1. If a petition for an *ex parte* order suppresses any fact which, whether material or not, would, if communicated to the officer, whose duty it is to draw up the order, prevent him from doing so without mentioning the matter to the Court, the order will be discharged for irregularity. *Cooper v. Lewis*, 178

2. An order discharged for irregularity with costs, though the notice of motion was general. An order may be impeached for irregularity, although the notice of motion do not specify that as the ground of it, the omission being material only as to costs, and not always even as to them. *Brown v. Robertson*, 173

3. Under an order for time to answer, the defendant may put in a plea, even in abatement.

Where a defendant having obtained such an order upon grounds which would only have justified an extension of time to put in an answer, afterwards availed himself of it to put in a plea of outlawry, an order made by the Court below to take the plea off the file "for irregularity" was discharged, on the ground, that whether the filing of the plea was or was not, under the circumstances, contrary to good faith, it was not irregular. *Hunter v. Nockolds*, 540

See GENERAL ORDERS, 6.
INTERPLEADER.
JURISDICTION, 4, 5, 6, 7.
LACHES.
PAUPER.
PLEADING.

ISSUE.

1. Form of issues directed in a foreclosure suit to ascertain whether a mortgage deed forty-five years old had ever subsisted as a security, and if so, whether it had been satisfied. *Wynne v. Styan*, 303

2. An issue, whether a security had been "unfairly" obtained, superadded to an issue whether it had been fraudulently obtained, disapproved, from the uncertainty of what, in a legal sense, constitutes unfairness as distinguished, if it be distinguished, from fraud. *Parker v. Morrell*, 453

3. At the hearing of a suit to enforce an equitable security for the payment of an annuity which was impeached on the ground of a defective statement of the consideration in the memorial, the Court below directed an issue to try whether the deed

was a good, valid, and binding deed, and whether the plaintiff was, by virtue thereof, entitled to recover the annuity, but at the same time ordered that the defendant should, on the trial, admit the due execution of the deed (such execution having been regularly proved in the cause.) Held, on appeal, that such order was inconsistent with the form of the issue: and further that as the plaintiff's title to relief in equity depended on a legal right, the Court ought not to interfere with the trial of that right in a Court of law by requiring the defendant to admit any fact upon which it depended. *Elderton v. Lack*, 680

4. On a bill to restrain the continuance of a trespass alleged to have been actually committed, the Court, in putting the plaintiff to his action, will not require the defendant to admit any fact that enters into the question of trespass, at least unless such fact be clearly and unqualifiedly admitted in the answer. *Duke of Beaufort v. Morris*, 683

5. A bill by a vicar claiming, as such, a customary payment of 6d. in the pound on all lands and houses within the parish, was, on a rehearing, retained with liberty to the plaintiff to bring an action; the Lord Chancellor considering that a more proper course than the one proposed to be taken by the Court below, of directing first an issue to try the immemoriality of the custom, and then taking the opinion of a Court of law upon the validity of such a custom; the case being one in which the jurisdiction of this Court was resorted to merely as ancillary to a legal right.

Suggestion as to the propriety in such cases, of going to law first to ascertain the right, before filing the bill, in this Court. *Butlin v. Masters*, 290

6. It being suggested that, in consequence of the subject matter of the plaintiff's claim being an ecclesiastical due, the proceedings necessary for ascertaining his right would have to be commenced in the Spiritual Court, the Order (*ante* p. 291.) was varied merely by giving the plaintiff liberty to take such proceedings (instead of bringing such action,) as he might be advised, for the purpose of establishing his right; the Court being of opinion that the peculiar nature of the demand, and of the remedy applicable to it, afforded no reason for departing from its usual course of procedure in a case in which its jurisdiction was resorted to merely as ancillary to a legal right. *Butlin v. Masters*, 529

See COURTS.
RETAINING BILL.

JOINT STOCK COMPANY.

See INJUNCTION, 8.
MULTIVARIQUENESS.

JURISDICTION.

1. The committee of a lunatic is personally responsible in that character to no jurisdiction but the Great Seal. And, therefore, where a committee had neglected to comply with an order in lunacy, authorizing him to make certain payments out of the lunatic's estate, in discharge of a liability which had been established against the lunatic in a suit at the Rolls; an order pronounced by the Master of the Rolls on a petition in the cause, that the payments be made "by the lunatic or the committee" on or before a given day, was discharged, on the ground that the application ought to have been made in the lunacy, and that the Master of the Rolls had no jurisdiction to entertain it. *Ames v. Parkinson*, 388

2. A builder agreed, by a written contract under seal, with a board of guardians, to build a workhouse according to a certain plan for a certain sum: and any deviations from the plan, which the board or their architect might order in the course of the work, were to be valued in a particular manner, and the value added to or deducted from the stipulated price, as the case might be; but it was expressly provided that no allowance was to be made to the builder for additional work, unless the same should be ordered in writing. After the builder had been paid for all the work done pursuant to the written agreement, he filed a bill against the board, alleging that much additional work had been done with the knowledge and sanction of the board, and on the faith of an assurance from their agent that no written order for it was necessary, and praying an account and payment of what was due in respect of such work. On a general demurrer to the bill, Held, first, that the subject-matter of the claim was not of itself within the jurisdiction of this court; and, secondly, that the alleged fraud on the part of the board, in taking advantage of the want of a written order to avoid paying for work which they had sanctioned, would not give the court jurisdiction, and that bills to enforce parcel contracts within the Statute of Frauds, on the ground of part performance were different, the court having jurisdiction in those cases over the original subject-matter, viz. the contract, and the question being whether that jurisdiction was ousted by the want of a writing, whereas here the attempt was to make the want of a writing the ground of ju-

risdiction. *Kirk v. The Bromley Union*, 640

3. Creditors of an insolvent cannot maintain a suit respecting property or rights alleged to have belonged to the insolvent, and to be vested in his assignee under the Insolvent Debtor's Acts, upon an allegation of collusion between the assignee and the party against whom the relief is prayed: and the same rule applies to suits for a similar object by the insolvent himself. *Heath v. Chadwick*, 649

4. Proceedings by a creditor under the 1 & 2 Vict. c. 110, s. 8, with a view to making the alleged debtor a bankrupt in default of his paying the demand, will not be interfered with in a court of equity on the ground merely of an allegation that such proceeding is dictated purely by fraud and malice, and that no debt is in fact due. *Pim v. Wilson*, 653

5. *Semble*, where the right of a party to petition Parliament against a bill pending there, depends solely upon his having some private interest which is likely to be affected by it, this Court has the same jurisdiction to restrain him by injunction from so petitioning, as it would have to restrain him from bringing an action at law or asserting any other right connected with such interest. *Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and the Clarence Railway Companies*, 666

6. A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law. *Tulk v. Moxhay*, 774

7. *Semble*. When an action is referred by an order at Nisi Prius, this court has no jurisdiction to interfere with the certificate of the referee or with the judgment entered up pursuant thereto, on any ground on which it would not have such jurisdiction if the judgment had been obtained in the ordinary course upon the verdict of a jury. *Chuck v. Cremer*, 477

See ACCOUNT.

AWARD.

INJUNCTION.

ISSUE.

PERPETUATION.

PRINCIPAL AND AGENT.

SPECIFIC PERFORMANCE.

LACHES.

An objection of mere form, not going to the substance of the case, should be taken speedily; for if a party being aware of such objection allows his adversary to take consequential proceedings without noticing it, he will not be allowed afterwards to raise it. *Steele v. Plomer*, 780

LAPSE.

See CONSTRUCTION, 8.

LIEN.

The charterer of a ship in a foreign port, who had notice of a prior mortgage on the ship and its future earnings, agreed with the master, who was also owner, to advance on bottomry such sum as should be necessary to equip the ship for the homeward voyage, and a bottomry bond was accordingly executed, but the amount of the necessary expenses of outfit turned out greater than that for which the bond was given. Held, that, as against the mortgagee, he was not entitled to set off the excess against the sum which became due under the charter-party. *Dobson v. Lyall*, 325

LIMITED ADMINISTRATION.

See ADMINISTRATION AD LITEM.

LUNACY.

I. Carriage of Commission.

1. Where there is a contest between several parties for the carriage of a commission of lunacy, the court considers only which of them is most likely to bring out the truth, and no regard is paid to proximity of relationship or other considerations of that kind, though these are of importance when the question is as to the appointment of a committee. *In re Webb*, 10

2. On a contest for the carriage of a commission of lunacy, that party is selected who is most likely to bring out the whole truth; subject to which a preference is given to the nearest of kin.

Applications by other parties for leave to attend the execution of the commission are in the discretion of the court, and mere relations are not generally allowed to do so unless they have an interest.

A suggestion that a party, who applied

for such leave on the ground of interest should, as the condition of its being granted, be concluded by the verdict, overruled. *In re Nesbitt*, 245

II. Appointment of Committee.

1. In a contest for the committee of a lunatic, the party who has had the carriage of the commission is not on that ground entitled to any preference.

Where the issuing of a commission of lunacy is opposed, or the carriage of it contested, the court will not prospectively give leave to any party to propose himself as committee in the event of the subject of the commission being found of unsound mind, but in issuing the commission will direct that no proceedings be taken for the appointment of a committee until further order. *In re Webb*, 10

2. A bastard tenant for life of real estates being found lunatic, leave was given to his natural daughter, who had resided with him up to the time of his confinement, to carry in proposals for a committee of the estate as well as of the person, as a check upon the remainderman. *In re Webb*, 116

3. The mother and guardian of an infant tenant in tail in remainder, preferred to the nominee of the party interested in the personal estate of a lunatic, tenant for life, as committee of his estate. *In re Webb*, 532

III. Allowances to Committee.

1. The committee of the estate of a lunatic is not entitled to any remuneration for his trouble. Where any allowance at all is made to him, it is not for his sake, but for the benefit of the estate, as where rents cannot be effectually collected by the committee without assistance. *Re Walker*, 630

2. Allowances, not exceeding 5 per cent. on receipts, to committee of lunatic's estate for expenses out of pocket in collecting rents. *Re Westbrooke*, 631

3. A committee, who, having been authorized by the court to expend a certain sum in rebuilding a farmhouse, expended half as much again in building one of larger size on a different site, was not allowed the excess; although what he had done appeared to be beneficial to the estate. *In re Langham*, 299

4. On the death of a lunatic, where there had been no order for a maintenance.

the personal representative offered to consent to an order for payment of a liquidated sum to the interim committee for past maintenance, in order to avoid the expense of a reference, the estate being inconsiderable. But the Lord Chancellor refused to sanction the payment, unless on the consent of the parties beneficially interested in the surplus of the estate. *In re Patrick*, 394

IV. Allowances to Relations.

1. The modern practice of making allowances out of lunatics' estates for their collateral relations disapproved, and to be kept within narrow limits.

A comparatively small sum which the Master had approved as proper to be allowed out of the surplus income of the lunatic, which was very considerable, for drainage of an estate of which the lunatic was tenant for life, with remainder to his brother, was disallowed by the Lord Chancellor, though no one objected to it. *In re Clarke*, 282

2. Application for a reference as to the propriety of advancing a large sum of money out of the capital of a lunatic's estate, to enable his eldest son to purchase an estate, refused. *In re Thomas*, 169

V. Securities.

Securities belonging to a lunatic's estate, ordered to be deposited with the Master for the purpose of reducing the amount of the committee's recognizances. *In re Eagle*, 201

VI. Superseding Commission.

The Lord Chancellor will not in general supersede a commission of lunacy after verdict, without seeing the lunatic.

A commission cannot be superseded as to the person of the lunatic, and at the same time continued in force as against the parties accountable for the lunatic's estate.

But a lunatic who has recovered will be allowed, without superseding the commission, to have the control of his fortune, and to superintend the prosecution of accounts against accounting parties without the intervention of the committee. *In re Joanna Gordon*, 242

LUNATIC MORTGAGEE.

The costs of proceedings under the 1 W. 4, c. 60, s. 3, for the purpose of obtaining a reconveyance of a mortgagee estate from

a lunatic mortgagee, are to be borne by the lunatic's estate. *In re Townsend*, 348

LUNATIC TRUSTEE.

The court may appoint a new trustee on petition, under 1 W. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees. *In re Foxhall*, 281

MARRIAGE ACT.

In settling the property of a minor, who has been married in fraud of the provisions of the Marriage Act, 4 G. 4, c. 76, the court is bound to carry into effect the directions given by the act for preventing the offending party from deriving any pecuniary benefit from the marriage, as far as may be without prejudicing the pecuniary interests of the innocent party and the issue of the marriage. And, therefore, in a case where the minor was a female, the court refused its sanction to a general power of appointment being given to her, in case she should die before her husband, over one-third of her property, though there should be children; as she might exercise it in favor of her husband to the prejudice of the children; but the court approved of a power being given to her in case she survived her husband, though there should be children, of appointing such one-third either by deed or will; as it was for her benefit to be able in that case to make provision for a second marriage.

Held, also, that it was no objection to the settlement, that a child dying in the lifetime of the father, after having attained a vested interest under its limitations, might bequeath such interest to the father. *Attorney-General v. Lucas*, 753

MARRIED WOMAN.

1. The court will not make a peremptory order upon a married woman, to execute a conveyance of an estate not settled to her separate use. *Jordan v. Jones*, 170

2. A fund in court was subject to a trust for a husband for life, remainder to his wife for life, remainder to their son absolutely. The husband and son, by deed, surrendered and released their respective interests to the wife for the express purpose of giving her a present absolute interest in the fund, and thereby enabling her to assign it at once to the son. But a petition by

the three for payment of the fund to the son was refused, on the ground that this court will not establish an equitable merger by analogy to law, where the effect would be to defeat its own rules and practice in the protection of married women from the marital control. *Whittle v. Henning*, 731

See HUSBAND AND WIFE
NEXT FRIEND.

MERGER.

See MARRIED WOMAN, 2.

MINES.

The purchaser of shares in a mining company is not entitled to a regular abstract of title to the mines themselves as if he were purchasing a share in the land in which they are worked; but he is entitled to such evidence of the constitution of the company and of the nature of the title under which the mines are worked, as will show that the subject matter of the purchase is what it professes to be, and that the proposed form of transfer to him will give him a valid title to the shares. *Gurling v. Flight*, 613

MISJOINDER.

See PARTIES, 5.

MISREPRESENTATION.

A. and B. having for many years been partners in business as solicitors, dissolved their partnership in 1834, and the business continued to be carried on by A. alone, until 1841, when he became bankrupt, and it was then discovered that a sum of money which had been paid by a client into the joint account of the firm at their bankers in 1829, for the purpose of investment, and which A. had shortly afterwards represented to have been invested accordingly, and on which he had regularly paid interest on that footing, had, instead of being invested, been appropriated by him to his own use. Upon a bill filed by the client against B. to make him liable for the money,

Held, 1st, That, even assuming the defendant to have been (as he alleged he was) personally ignorant, from the beginning of the whole transaction, and to have derived no benefit from the fraud, still he was bound by the representation of his partner—such representation relating to a matter within

the limits of the partnership business, and amounting therefore to a guarantee by the firm to the parties concerned, that they should be placed in the same situation as if the fact represented was true.

2d. That, although the plaintiff might have a right of action at law for the money, he had also a concurrent remedy, on the ground of fraud, in equity.

3d. That in equity the effect of the misrepresentation, so far as regarded the Statute of Limitations, was the same as if it had been made on the day the fraud was discovered, notwithstanding the partnership had been dissolved more than six years before. *Blair v. Bromley*, 354

MISTAKE.

Promises were sold for the residue of a term of which both parties at the time supposed that eight years only were unexpired, and the price was fixed expressly on that supposition. It afterwards appeared that twenty years were in fact unexpired at the time of the sale. But a bill by the vendor to make the purchaser a trustee of the term for the twelve additional years was dismissed. *Okill v. Whittaker*, 338

MORTGAGE.

A. having mortgaged an estate to B. and C. in succession, agreed to sell it to D. free from incumbrances; part of the purchase money was to be paid down, and the rest on the completion of the purchase. During the investigation of the title A. induced D., who was ignorant of the mortgages, to make further payments on account of the purchase money, and having also raised a further sum from E. on the security of his contract, without giving him notice of C.'s mortgage, became insolvent and absconded. A. thereupon, with notice of all that had happened, paid off C.'s mortgage out of the balance of the purchase money remaining due, and E. to secure himself, took an assignment of B.'s mortgage. But the balance of purchase money not being sufficient to pay both E.'s charge and what E. had paid to B., Held, reversing the judgment below, that E. was not entitled to tack his security to B.'s mortgage, first, because his security was not a security on the estate, but only on the purchase money: and, secondly, because, although E. at the time he advanced his money had no notice of any particular incumbrance on the estate except B.'s, he knew that he was dealing for a supposed balance, out of which D., having contracted for the estate free from incumbrances, would be entitled to pay off

any incumbrances to which the estate might be found to be subject, and therefore the equities of D. and E. were not equal. *Lacey v. Ingle*, 413

See FORECLOSURE.

LIEN.

PARTIES, 3.

PRINCIPAL AND SURETY.

STATUTE OF LIMITATIONS.

MULTIFARIOUSNESS.

An individual shareholder in an insolvent joint-stock company, being sued at law by a banking firm consisting of five partners, one of whom was also a shareholder in the company, for a debt due from the company to the bank, filed a bill against the plaintiff at law, and all the other shareholders in the company, praying that the affairs of the company might be wound up, and that, in the mean time, the action might be stayed. A general demurrer by the other four partners in the bank was allowed, on the ground that the relief prayed necessarily involved the winding up of the affairs of the bank as well as of the company, which, if it had been specifically prayed, which it was not, would have rendered the bill multifarious. *Rheem v. Smith*, 726

MUTUALITY.

See INJUNCTION, 3, 4.

NAVIGATION LAWS.

See ILLEGAL CONTRACT.

NEXT FRIEND.

An application by a married woman plaintiff, for leave to change her next friend, is in the discretion of this court, and will not be granted if there be reason to believe that the defendant's security for costs will be thereby prejudiced.

Whether the court will stay proceedings in a suit by a married woman on the ground that her next friend is not of ability to answer costs. *Quere. Jones v. Fawcett*, 278

NEXT OF KIN.

See CONSTRUCTION, 1, 9.

NOTICE.

See LIEN.

MORTGAGE.

NULLITY.

NULLITY.

An order of the Court of which the party affected by it has notice, though not formally served upon him, is not to be disregarded or treated by him as a nullity, however certain it may be that the order is erroneous, and would, upon a proper application for that purpose, be discharged. *Chuck v. Cremer*, 113

PARLIAMENT.

Under an act of parliament by which the conservators of river banks were empowered to apply the funds under their control, (which were raised by a rate upon the proprietors of adjacent lands), "in doing, constructing, and executing all such works, acts, matters and things as they should from time to time deem necessary, proper or expedient for putting the banks into and maintaining the same in a permanent state of stability:" Held, that they were authorized to apply a portion of the fund in watching and, if necessary, opposing, a bill in parliament for a project lower down the river, which was likely to be injurious to the banks under their superintendence. *Bright v. North*, 216

See JURISDICTION, 5.

PARTIES.

1. The absence of a necessary party to any part of the relief prayed by a bill, though the prayer be in the alternative, is a good objection on demurrer.

An allegation that the defendant being the person entitled to take out representation to a deceased party, refuses to apply for it, and impedes the plaintiff in procuring a grant of it to any other person, is not a sufficient answer to a demurrer founded on the absence of such representative; but, *secus*, if the bill alleges that the grant of representation is actually in litigation in the Ecclesiastical Court. *Penny v. Watie*, 149

2 A party entitled to a moiety of an ascertained fund cannot maintain a suit for payment of his share without making the person entitled to the other moiety a party,

U, owing to a breach of trust, the whole fund is not forthcoming. *Semble* :

And the decision in *Perry v. Knott* (5 Beav. 293), to the contrary, disapproved. *Lenaghan v. Smith*, 301

3. The personal representative of a deceased tenant for life of a mortgaged estate, is not a necessary party to a bill by the mortgagee against the remainderman, although the bill pray payment of an arrears of interest which accrued during his lifetime. *Wynne v. Styson*, 303

4. The rule which allows the first tenant in tail to represent the fee in suits affecting the estate does not apply to heirs of entail under a Scotch deed of tailzie; and therefore a decree in a suit framed upon that principle, for the administration of a fund which in certain event was liable to be invested in the purchase of land in Scotland to the uses of a Scotch deed of tailzie, was opened at the instance of a subsequent heir of entail under that deed.

How far and in what cases the heirs of a Scotch entail are necessary parties to a suit in this Court touching matters in which they are interested as such heirs of entail, *quere*. *Fordyce v. Bridges*. 497

5. The contingent interest of a testator's widow under an ultimate limitation of personality, in the event of the death of all his children under twenty-one, "to those who would then be entitled, under the Statute of Distribution," is sufficient to make her a proper party, as co-plaintiff with the children, in a suit for administration of the estate. *Roberts v. Roberts*, 534

See EXAMINATION OF PARTIES.
PERSONAL REPRESENTATIVE.

PARTNER.

See EVIDENCE, 2.
FRAUD, 4.
INJUNCTION, 8.

PART PERFORMANCE.

See JURISDICTION, 2.

PAUPER.

The meaning of the common affidavit required on applications for leave to sue or defend *in forma pauperis* is, that the party has not 5*l* in the world besides &c. available for the prosecution or defence of the suit: and if he can make the affidavit with

truth in that sense, the omission to set forth the details of his means and the circumstances which render them unavailable, is not such an omission of material facts as will induce the Court on that ground alone to discharge the order. *Dresser v. Morton*, 286

PAYMENT INTO COURT.

A trustee charged with misapplication of trust-moneys, admitted by his answer that he had misapplied three sums, and set forth a debtor and creditor account, in which he credited himself with, amongst others, those three sums, and also with a fourth sum which was equally inadmissible, but which turned the balance of the account in his favor. On a motion for payment of the three sums into court, Held that the plaintiff, not having in his motion challenged the fourth sum, the motion could only be granted to the extent to which the answer admitted a balance after striking those three items out of the discharge. *Nokes v. Seppings*, 19

PERPETUATION OF TESTIMONY.

It is no objection to the publication of depositions which have been taken in a suit to perpetuate testimony that the proceedings, for which they are required, are in the court of a foreign country, or that other depositions taken in a similar suit in that country have already been published.

Semble. This court has jurisdiction to perpetuate testimony with a view to proceedings in foreign courts. *Morris v. Morris*, 205

PERSONAL REPRESENTATIVE.

On a demurrer to a bill seeking payment of a legacy out of assets come to the hands of the defendant, who was the husband of the sole executrix, deceased: Held, that an allegation that all the testator's debts and the other legacies bequeathed by his will had been paid, and that there were assets *ultra* in the hands of the defendant to satisfy the plaintiff's demand, was not sufficient to dispense with the presence of a personal representative of the testator: the allegation being one which, even if admitted by the defendant, the court would not take his word for. *Penny v. Watts*, 149

See LUNACY.
PARTIES, 3.

PETITION OF RIGHT.

1. The Lord Chancellor will not make an order for a commission upon a petition of right without notice to the Attorney-General. *In re Robson*, 84

2. The first step in proceedings upon a petition of right on which the royal endorsement has been made is, to ascertain the facts in which the petitioner's claim is founded: and a commission for that purpose is of course, unless the Attorney-General be willing to admit the facts as alleged, and to take issue upon them by demurrer. *In re Boren de Bode*, 85

PLEA.

See IRREGULARITY, 3.
REVIVOR.

PLEADING.

1. A question between the heir at law and next of kin as to conversion of real estate, cannot be disposed of in a suit in which neither of those parties is plaintiff. *Rigby v. Strangways*, 175

2. A bill of review, or a supplemental bill in the nature of a bill of review, is necessary where the title or subject-matter of the claim has been directly adjudicated upon in a former suit by a decree declaring or assuming a right or, in the case of a dismissal of a bill, negating it: but an order of dismissal is a bar only when the court has thereby determined that the plaintiff has no title to the relief sought by the bill, and, therefore, the dismissal of so much of a bill as relates to an issue raised by it which is irrelevant to the relief prayed, is no bar to a new bill by the same party for a different object depending upon the same issue.

The proper test by which to try whether a bill, which recites a decree and proceedings in a former suit, is, in reference to such a decree, to be considered a supplemental bill in the nature of a bill of review, is to see whether, if such decree and proceedings were omitted from the bill, they could be effectually pleaded in bar to it: for which purpose it is not sufficient that the plaintiff's claim in the second suit depends upon a determination of some issue at variance with the determination of the same issue in the former suit, unless such issue be relevant to the objects of both suits, and be raised between the parties in the same rights and in reference to the same subject-matter of claim.

A purchaser, from the trustees under a will of 1818, of part of the devised estates filed a bill against the trustees and the parties beneficially interested, suggesting that the will had been obtained by fraud, and was invalid, but praying no relief on that supposition, but only that the validity of the will might be inquired into, and that, if it should be found to be valid, the contract might be specifically performed. At the hearing, the bill was dismissed as against all the defendants, except the trustees, and that part of it which went to impeach the will was dismissed as against the trustees also, and the usual reference was directed as to title, and the Master having reported in favor of the title, a decree was ultimately made for specific performance. Some years after, the same plaintiff filed another bill against the parties in possession of the rest of the estates under the will of 1818, reciting the former decree and proceedings; but charging that the will of 1818 had been obtained by fraud and when the testator was incompetent, and praying that it might be set aside, and that the plaintiff might be declared entitled to the estates under a limitation in a prior will of 1815, under which, supposing the will of 1818 to be invalid, his title had just accrued. Held (reversing the decision below) that the decree and proceedings in the former suit were no bar to the institution of the second, on the ground, 1st. That the issue raised by the first suit as to the validity of the will of 1818 was not relevant to the object of that suit: 2dly. That the two suits were not brought by the plaintiff in the same right, or 3dly, for the same subject-matter of claim. *Bainbrigg v. Baddeley*, 705

A bill by the representative of a deceased partner against the surviving partner, for an account of the partnership dealings and transactions, contained an allegation that the defendant had employed and intended to employ the assets of the late partnership in carrying on the business on his own account, but prayed no relief in respect of such allegation, and the decree merely directed the ordinary partnership accounts, reserving further directions. But on the death of the defendant some years afterwards, and before the Master had made his report under the decree, the same plaintiff filed a bill of revivor and supplement against the representatives of the late defendant, repeating the allegation above-mentioned as to the employment of the partnership funds, and praying an account of the profits made thereby, in addition to the usual prayer for carrying on the accounts directed by the former decree. Held (reversing the decision be-

low) that such bill was not, in reference to the decree in the original suit, a supplemental bill in the nature of a bill of review, the new relief founded upon the allegation above-mentioned not being inconsistent with that decree, but so far from it, that the accounts directed by the decree were necessary to raise the case for such new relief, and must have been directed, if both claims had been united in one suit.

The question in such cases turns upon the matter of the decree, and not upon allegations in the original bill to which the decree does not apply. *Toulmin v. Copland*, 711

4. A bill of review for error apparent on the decree, applies only to errors of form, and not to errors of judgment upon the merits. *Trulock v. Robey*, 395

See DECREE.

FRAUD, 1, 2.

INQUIRY.

SUPPLEMENTAL ANSWER.

WILFUL NEGLECT.

POWER (DISCRETIONARY.)

1. A testator bequeathed the residue of his personal estate to three persons, their executors, administrators, and assigns, in trust, that they or the survivor of them, or the executors, administrators, or assigns of such survivor, should invest it in the purchase of estates in England or Scotland, such estates, if in England, to be settled according to the limitations of the same will as to his own English estates, which were thereby limited to one for life, with remainder to his first and other sons in tail, and, if in Scotland, according to the limitations of a Scotch deed of strict entail, to which his own Scotch estates were then subject; and until such purchase could be found, should pay the income of the residuary fund to the person who would be entitled to the rents of the English estates so to be purchased in case the same were actually purchased. And the will contained a power to such person, or, in case of his minority, to his guardian, to appoint new trustees, who were to have all the powers and capacities of those in whose room they should be substituted. The three trustees invested the greater part of the residue in Scotch estates, and all died during the lifetime of the tenant for life. On his death, his son, who was entitled under the Scotch deed to the Scotch estates, as well as under the will to the English estates, conceiving himself entitled absolutely to what remained of the residuary fund, executed disentailing deeds,

both of the money and of the English estates, and obtained payment of the fund to himself: but his right to do so being disputed on his death by the next Scotch heir of entail; Held that he had no such right, but that he was entitled only to the income of the fund during his life, and that upon his death, there being then no one by whom new trustees could be appointed under the power in the will, and the court being of opinion that the discretionary power of selecting between English and Scotch investment would not extend to trustees appointed by the court, the fund became divisible in equal moieties, one half belonging to the personal representatives of the deceased, and the other half to be invested in Scotch estates, to the uses of the Scotch deed. *Fordyce v. Bridges*, 497

2. A devise of all the testator's property in trust for his niece, subject to a discretionary power in the trustees, on her attaining twenty-one or marrying, to settle the whole or such part as they should think fit upon her and her children if she should have any, with remainder, in default of children, to her mother absolutely. The niece attained twenty-one; but before any settlement was made under the power she died, without having been married. Held, that the power could not be then exercised, and that her heir was entitled to the whole of the real estate. *Lancashire v. Lancashire*, 657

See BRANCH OF TRUST, 2.
CONSTRUCTION, 4.

PRACTICE.

1. Where there is a petition and cross petition, and several respondents in the one unite as co-petitioners in the other, the court will not allow such respondents to be heard by separate counsel, except so far as their cases turn upon questions distinct from each other. *In re Stephen*, 563

I. The rule that this court will not allow its process to be inquired of in a court of law is only for the protection of the party who has been instrumental in enforcing it, and does not give the party complaining of its exercise a right to elect between a reference to the Master and an action at law. *Arrowsmith v. Hill*, 609

See ACTION.

APPEAL.

CONTEMPT.

COSTS.

CREDITORS' SUIT.

See EMBODIMENT.**EXAMINATION OF PARTIES.****EXCEPTIONS.****FRAUD.****GRANTS APPROPRIATE.****ISSUE.****IRREGULARITY.****PRODUCTION OF DOCUMENTS.****RECOVER.****STAY OF PROCEEDINGS.****TITLE.****PRECATORY WORDS.**

A direction in a will that a certain person should be employed as agent and manager of the testator's estates whenever his trustees should have occasion for the services of a person in that capacity, Held not to create a trust which such person could enforce. *Finden v. Stephens*, 142

Words of recommendation or desire in a will, will not raise a trust if such construction would conflict with other provisions of more definite and positive import in the same instrument; but the court will give such effect to them as may not be inconsistent with those provisions.

A father having by his will appointed a guardian to his children, with a recommendation that, in the event of their mother's death during their minorities, they should be placed under the care of two female relations. Held, on a contest between those ladies and the testamentary guardian, in reference to the management of the children after the mother's death, that the court was bound to give effect to the recommendation, but not further than might be consistent with preserving to the testamentary guardian the general superintendence and control over the children and their fortunes, which, by virtue of his office, it was his right and duty to exercise. *Knott v. Cottey*, 192

PRESSURE.

See **TAXATION**, 4.

PRESUMPTION OF DEATH.

A sum of money was set apart in 1815 to answer an annuity to a woman then supposed to be resident in India, but who was never afterwards heard of. In 1837 the Master having certified, upon presumption, that she was dead, but without finding when she died, the court ordered payment of the principal money to the party entitled to it subject to the annuity. In

1849 the Master having certified, upon presumption, that she had died in 1823, and that no personal representative had been heard of, the court ordered immediate payment to the same party, of the accumulations since that time. And in 1847 it ordered payment of the rest of the fund to the same party though resident abroad, upon his giving his personal security to refund, in case the annuitant or her personal representative should ever establish a claim. *Cuthbert v. Parrier*, 199

PRINCIPAL AND AGENT.

The jurisdiction to protect by injunction the possession, and to decree the delivery up, of specific chattles, is not confined to chattles, the loss or injury of which would not be adequately compensated by damages, but extends to all cases in which the party in possession of the chattles has acquired such possession through an alleged abuse of power on the part of one standing in a fiduciary relation to the plaintiff. *Wood v. Rosecliffe*, 382

PRINCIPAL AND SURETY.

S., in consideration of a loan of 10,000*l.* from G., assigned to the latter two mortgages which he held upon an estate belonging to N., and executed another mortgage of an estate of his own by way of further security. Afterwards, on N.'s mortgage debts becoming due, S. brought an action against him on the covenants in his mortgage deeds, which G. filed a bill to restrain. On a motion before the Lord Chancellor to discharge an injunction which had been granted by the Vice-Chancellor—Held, that it ought not to have been granted, except upon the terms of the plaintiff reconveying S.'s mortgage and releasing him from his mortgage debt, and the plaintiff now declining these terms, and S. undertaking that the sum to be recovered in the action should be paid to the plaintiff, the injunction was dissolved. *Gurney v. Sepplings*, 40

PRIVILEGED COMMUNICATIONS.

See **PRODUCTION OF DOCUMENTS**, 1, 3.

PRODUCTION OF DOCUMENTS.

1. On a motion for production of documents, it is for the plaintiff to show from the admissions in the answer that the documents relate to the contents of the bill as

it stands when the motion is made. And, therefore, where after an answer admitting possession of certain documents relating to the matters mentioned in the bill, or some of them, the plaintiff amended his bill by striking out part of it, and then moved upon that answer, the motion was refused. *Ha-verfeld v. Pymon*, 202

2. *Latimer v. Neate*, 4 Cl. & Fin. 570, explained.

The mere statement, in an answer, of the substance of a document, the contents of which the defendant is not bound to disclose, does not make him liable to produce the document itself.

The principal question in the cause was, whether a party who was equitably entitled for life to a long term of years with a general power of appointment over the residue of the term had by a certain deed assigned the whole term to a party under whom the defendant claimed, or only her life interest. The plaintiff asserted that the deed had passed only the life interest. The defendant set forth a short abstract of the deed as showing the contrary. A motion for production of the deed was refused.

Production of a deed constituting the root of the plaintiff's alleged title, under particular circumstances refused. *Glover v. Hall*, 484

3. The question in the cause was, whether two of the defendants had taken a conveyance of an estate from the principal defendant, with notice of a certain proceeding in the Ecclesiastical Court, in which the bill alleged that they had acted as his solicitors. The principal defendant, by his answer, denied that they acted as his solicitors in that proceeding, but the two other defendants, by their answer, insisted on withholding the production of certain letters in their possession as being privileged communications between the principal defendant and themselves while acting as his solicitor. On a motion for production of the documents, held that the plaintiff was not entitled to read the answer of the principal defendant in reply to that claim of privilege; but the motion was ordered to stand over, with leave to the plaintiffs to amend their bill for the purpose of pointing that defendant's attention to his relation to the co-defendants in reference to the particular documents, and, upon his answer to their amended bill, production was ordered. *Blenkinsopp v. Blenkinsopp*, 607

RAILWAY.

1. The condition of a bond given by a railway company under the 85th section of the 8 Vict. c. 18, on taking possession of land before the purchase money was ascertained, was "on demand to pay to the owner, or on demand to deposit in the bank the amount of such purchase money when determined." Held, that the condition was bad, as giving to the party claiming to be owner, the option of compelling payment the substance either to himself or into the bank, whatever the title might turn out, and an injunction was granted till a proper bond should be executed. *Poynder v. The Great Northern Railway*, 330

2. Question, whether under the words "Railway and works," a railway company had a right, by the compulsory powers of their act, to take a piece of land for the purpose of building a station. Held, that they had. *Cotter v. Midland Railway Company*, 469

3. The three months allowed by the 8 Vict. c. 18, s. 23, to "the arbitrators or their umpire" for making their award, is not one and the same period, but the umpire has a new period of three months for making his award, from the time when the arbitration devolves upon him. *Skerratt v. North Staffordshire Railway Company*, 475

4. A Railway Company is entitled, under the Lands Clauses Consolidation Act, to give a second notice to the same landowner for land within the limits to which their compulsory powers extend, if, from unforeseen circumstances, the land taken under the first notice turn out to be insufficient for the authorized purposes of their railway. *Stamps v. The Birmingham and Stour Valley Railway Company*, 673

5. The sum deposited by a railway company in court under the 85th section of the Lands Clauses Act, 8 Vict. c. 18, is not subject to any lien for the costs of the vendor; but upon due performance of the condition of the bond mentioned in the same section, the company are entitled to have the money paid out to them, notwithstanding the pendency of a question between them and the vendor with respect to such costs. *In re London and South Western Railway Extension Act*, 772

PUBLICATION.

See FIDELITY.

RECEIVER.

1. A receiver who, without the sanction of the court, defends an action brought

against him by a party to the cause, is not on that account disentitled to the assistance of the court, in recovering from such party the extra costs of the action, although, if his defence had failed, he would not, under such circumstances, have been entitled to reimbursement. *Bristowe v. Needham*, 190

2. Upon the Master's certificate that a receiver is in default, the four day order upon him is of course. and, therefore, a motion to discharge such order on the ground of error or irregularity in the certificate, but not directly impeaching the certificate itself, will be refused. *Scott v. Platel*, 229

See GENERAL ORDERS, 9.

RECOMMENDATION.

See PREGATORY WORDS.

RETAINING BILL.

Where a bill is retained at the hearing with liberty to the plaintiff to bring an action, the order ought to go on to direct, that in case the action be not brought within a certain time, the bill shall stand dismissed. *Wood v. Rowcliffe*, 382

See EVIDENCE, 3.

REVIEW.

See PLEADING, 2, 3.

REVIVOR.

Plea to a bill of revivor overruled on a point of form, as tendering an immaterial issue. *Andrews v. Lockwood*, 398

REVOCATION.

See SUBSTITUTION OF LEGACY.

SACERDOTIUM.

See COLLEGE STATUTES.

SALARY OF COMMITTEE.

See LUNACY, III.

SCRIP.

See SPECIFIC PERFORMANCE, 1.

SCOLCH ENTAIL.

See PARTIES, 4.
POWER, 2.

SEPARATE PROPERTY.

A wife, being of unsound mind and in confinement, her husband being poor and unable to maintain her, the court ordered that the surplus income of her separate property, after providing for her maintenance, should be paid to the husband, but refused to apply any part of the principal fund to reimburse the husband what he had actually paid for her past maintenance.

Whether, if the expenses of her past maintenance had been still unpaid, that circumstance would have made any difference, *Qu. Edwards v. Abrey*, 37

SERVICE.

I. ABROAD.

See GENERAL ORDER, 7.

II. SUBSTITUTED.

One of three defendants against whom a decree with costs had been made, being abroad and not likely to return, and his solicitor being dead, the court refused to order the taxing-master to proceed with the taxation of costs upon warrants served only on the solicitor of the two other defendants; but ordered that service at the late residence of the absent defendant, where some of his family were still residing, of a subpoena to appoint a new attorney, should be good service on the defendant. And upon such subpoena having been served accordingly and no attorney appointed, the court subsequently ordered the Master to proceed in the party's absence. *Gibson v. Igno*, 402

SETTLEMENT.

See MARRIAGE ACT.

SHERIFF.

See GENERAL ORDERS, 2.

SOLICITOR.

See TAXATION.

SPECIFIC PERFORMANCE.

1. Demurrer to a bill against the provisional committee of a projected railway company for the specific performance of an agreement to deliver to the plaintiff a certain number of scrip certificates, allowed; there being no allegation in the bill that the defendants had in their possession any scrip to deliver, but statements, from which the contrary might rather be inferred.

Whether such an agreement is a subject for specific performance: *Quare. Columbine v. Chichester*, 27

2. By an agreement between three incorporated railway companies, A., B., and C., it was agreed that A. should purchase the other two railways when completed, and that, in the meantime, their capitals should be amalgamated for the purpose of such completion. A. undertaking to supply any deficiency: and it was provided that all the three companies should concur in applications to parliament for the necessary powers to carry the agreement into effect. At the time the agreement was entered into B. had power, with the consent of three fifths of its shareholders, to sell its railway to A., but C. had no such power, and neither B. nor C. had any power of amalgamation. The agreement was duly ratified by three fifths of the shareholders in each of the three companies, and C. subsequently obtained an act, giving it the required powers: but before a similar act was obtained by B. a large majority of its shareholders had become adverse to the project, so that no such act could be obtained; and the directors of that company, with the sanction of the shareholders, were proceeding to construct and dispose of their railway in a manner inconsistent with the agreement. A demurrer to a bill filed by A. against B. and its directors for specific performance of the agreement and an injunction, was overruled, and the injunction granted, it being clear that, for the completion of the purchase no further parliamentary powers were necessary, and it being at least doubtful whether the defendants could be heard in this court to say that the plaintiffs were not entitled to the performance of that part of the agreement, merely because there was another part (viz. the provision for amalgamation) which required additional parliamentary powers to give effect to it, which powers they refused to apply for.

The court will in many cases interfere

to preserve property *in statu quo* during the pendency of a suit in which the rights to it are to be decided; and that without expressing, and often without having the means of forming any opinion as to such rights. And, in order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favor of the plaintiff. If, therefore, the bill states a substantial question between the parties, the title to the injunction may be good, and yet the title to the relief prayed may ultimately fail. *Great Western Railway v. Birmingham and Oxford Junction Company*, 597

See ESTABLISHING WILL.
JURISDICTION.

STATION.

See RAILWAY, 2.

STATUTES OF LIMITATION.

Where a mortgagee is also tenant for life of the mortgaged estate, the Statute of Limitations does not begin to run against the mortgage title until his death; and the same rule applies where the mortgagee is tenant in common with others of the mortgaged estate. *Wynne v. Styon*, 303

See BREACH OF TRUST.
EQUITABLE WASTE.
MISREPRESENTATION.

STAY OF PROCEEDINGS.

1. After a suit for the execution of the trusts of a deed, by which real estates had been vested in trustees for sale and payment of incumbrances, which were very numerous, was nearly ripe for hearing, the court, at the instance of the owner of the estates, ordered all the proceedings to be stayed on payment to the plaintiff of all his pecuniary claims in the suit and costs (all other parties to the deed consenting,) although the plaintiff insisted that the execution of the trusts in this suit would incidentally affect other objects in which he was interested in reference to the estates comprised in it. *Damer v. Lord Portarlington*, 30

2. A party prosecuting a suit after notice of a decree in another suit, under which he may obtain all the relief which he seeks in his own, may be refused his costs of an application to stay proceedings:

but it is contrary to the practice, to order him to pay such costs.

Such application may be made by the plaintiff in a suit in which the decree has been made, if he have an interest in staying the proceedings, as well as by the defendant, although such plaintiff be not a party to the other suit. *The Earl of Portarlington v. Damer*, 262

3. Where two suits are instituted for the administration of the same estate, and on a decree being obtained in one of them, an application is made to stay proceedings in the other; the question always is, whether the latter suit asks any thing more than can be obtained in the former. *Rigby v. Strangways*, 175

4. A bill by a husband and wife, in right of the wife against her father, for an account, and a cross bill by the father to establish a set-off. The husband having put in a separate answer to the cross bill without leave of the court, and having filed a replication in the original suit, an order obtained by the father from the court below, to stay proceedings in that suit till the wife should have answered the cross bill, was, on suspicion of collusion between the father and daughter, discharged. *Lenaghan v. Smith*, 537

5. Where executors against whom a decree has been obtained in a creditor's suit, wish to stay proceedings in a similar suit instituted against them by another creditor in a different branch of the court, the motion ought to be made in that branch of the court to which the latter suit belongs, and not in the other. *Johnson v. White*, 689

See INJUNCTION, 1.

SUBSTITUTION OF LEGACIES.

A legacy given by an incomplete testamentary paper held to be in substitution for two legacies of greater amount given to the same party by a previous will and codicil.

If an incomplete testamentary paper, made before the 1st January 1838, contains internal evidence of an intention to make an entirely new disposition, and for that purpose to undo all that had been done by a previous complete will, the court will give effect to the new disposition as far as it goes in substitution for the former, but will treat the former one as operative so far as no substituted disposition is provided in its place. *Kidd v. North*, 91

SUBSTITUTION OF SECURITY.

After the death of the obligor in a bond, his executor and devisee in trust under his will, by which he had charged his real estates with payment of his debts, gave a new bond in his own name, for the same amount, to the obligee, who thereupon delivered up the original bond and signed an endorsement thereon, stating that he had accepted the new bond "in lieu of" it. The obligor in the new bond having afterwards become bankrupt, Held, in a creditor's suit for administration of the testator's estate, that the obligee had no right of proof upon the original bond. *Shore v. Shore*, 378

SUPERSEDEAS.

See LUNACY, VI.

SUPPLEMENTAL BILL OF REVIEW.

When an application is made for leave to file a supplemental bill of review on the ground of the discovery of new evidence, the question is not merely whether the evidence is material, but whether it is of such weight as, when taken in connection with the mass of evidence adduced on both sides at the former hearing, would have been likely, had it been then brought forward, to have turned the scale. *Hungate v. Gascoyne*, 25

See PLEADING, 2, 3.

SUPPLEMENTAL ANSWER.

Where the ground on which an injunction had been granted was displaced by matters which occurred subsequently to the filing of the answer, the court refused to dissolve the injunction on an affidavit of those matters, but gave leave to the defendant to introduce them upon the record by a supplemental answer. *Stamps v. Birmingham & Stour Valley Railway Company*, 673

SUPPRESSION.

See IRREGULARITY, 1.
FAUPER.

SURVIVORSHIP.

See CONSTRUCTION, 3.

TACKING.

See MORTGAGE.

TAXATION.

1. The provisions of the 37th clause of the 6 & 7 Vict. c. 73, for the authentication by signature of a solicitor's bill of costs, are intended for the protection of the client only, and therefore where a bill has been delivered without such authentication, that circumstance is no objection to an application by the client for its taxation.

The decision in *Ex parte Gaitskell*, in which it was held, that applications for the taxation of bills, in the second class of cases provided for by the thirty-seventh section of the statute, do not require notice, confirmed. *Re Pender*, 69

2. Under the common order for taxation of a solicitor's bill, it is the duty of the Taxing Master, for the purpose of ascertaining whether the bill has been paid, to inquire what sums have come to the hands of the solicitor applicable to such payment; and that description includes all sums received by him in his character of solicitor. *Cooper v. Ewart*, 362

3. A bill of costs incurred prior to the passing of the 6 & 7 Vict. c. 73, held to be within its operation, though none of the business included in it was business for which, before the statute, a bill would have been taxable.

A special agreement, which covers part only of the items of a bill of costs, does not prevent the Master from proceeding with its taxation, and, consequently, such a bill may be referred for taxation without a special order.

Whether the Master is bound by such partial agreements, or whether he has jurisdiction to decide upon their validity or propriety, *Quære*.

If the agreement goes to the whole bill, its validity must be determined before the bill can be referred for taxation; for, if valid, it precludes taxation. Whether that question can be decided upon petition, or whether it requires a bill to be filed, *Quære*. *In re Eyre*, 367

4. A shareholder and member of the managing committee of a provisionally registered railway company held entitled to an order on petition for delivery and taxation of the bills of the solicitors employed by such committee.

A compromise of a solicitor's claim for costs, if effected under circumstances of pressure upon the client, does not oust

the jurisdiction of the court to tax the bills upon petition. *In re Stephen*, 562

TENANT-IN-COMMON.

Mere occupation by one of several tenants in common of an estate if unaccompanied by exclusion, does not make him liable for rent to his co-tenants. *M'Mahon v. Burchell*, 127

Whether one tenant-in-common of a farm who has alone occupied and cultivated it, is liable, independently of contract, to account with his co-tenant, for a moiety of the profits, *Quære*.

An executor who had been tenant-in-common with his testator of a farm which the latter had alone cultivated, claiming to be a creditor of the estate for a moiety of the profits, the court directed an action to be brought to try the right. *Henderson v. Eason*, 308

See STATUTE OF LIMITATIONS.

TIME TO ANSWER.

See IRREGULARITY, 3.

TITLE.

Where, on a reference as to title, the Master has reported in favor of the title, upon exceptions, the court thinks he has done so erroneously or on insufficient grounds, the course is to give the respondent the option of a reference back to the Master to review his report. *Curling v. Flight*, 603

See ESTABLISHING WILL.
MINES.

TRAVERSING NOTE.

See GENERAL ORDERS, 8.

TRUSTEE.

See BREACH OF TRUST.
BROKER'S COMMISSION.

UNFAIRNESS.

See ISSUE, 2.

VENDOR AND PURCHASER.

See AUCTION.

ESTABLISHING WILL.

MISTAKE.

SPECIFIC PERFORMANCE.

WILFUL NEGLECT AND DEFAULT.

1. Proof of improper expenditure of money by executors will not support a decree against them for an account on the footing of wilful neglect or default.

A bill by residuary legatees prayed an account against the defendants, the executors, on the footing of wilful neglect and default, but made no case of misconduct, against them, except that they had improperly defended an action in which they had failed, and the costs of which they claimed to retain out of the estate. The court, at the hearing, although of opinion that the action ought not to have been defended, gave the defendants their costs of the depositions which had been taken relative to that subject, on the ground that having no connection with a case of wilful neglect and default, it was not a proper matter to be put in issue at that stage of the suit. *Smith v. Chambers*, 221

2. A trustee letting a farm originally at a proper rent, will not be held personally liable for the difference between that rent and the rent which, at a subsequent period of the tenancy, might have been obtained, merely because he neglected to give notice to quit a few months after there appeared to be a probability that the price of agricultural produce would enable him, with propriety as between landlord and tenant, to obtain a higher rent.

And, *semble*, that rule would be applicable, even to a case in which the tenant was a near relation of the trustee, unless there were some other circumstance to confirm the suspicion of personal favor which that relationship is calculated to excite. *Ferraby v. Hobson*, 255

WITNESS.

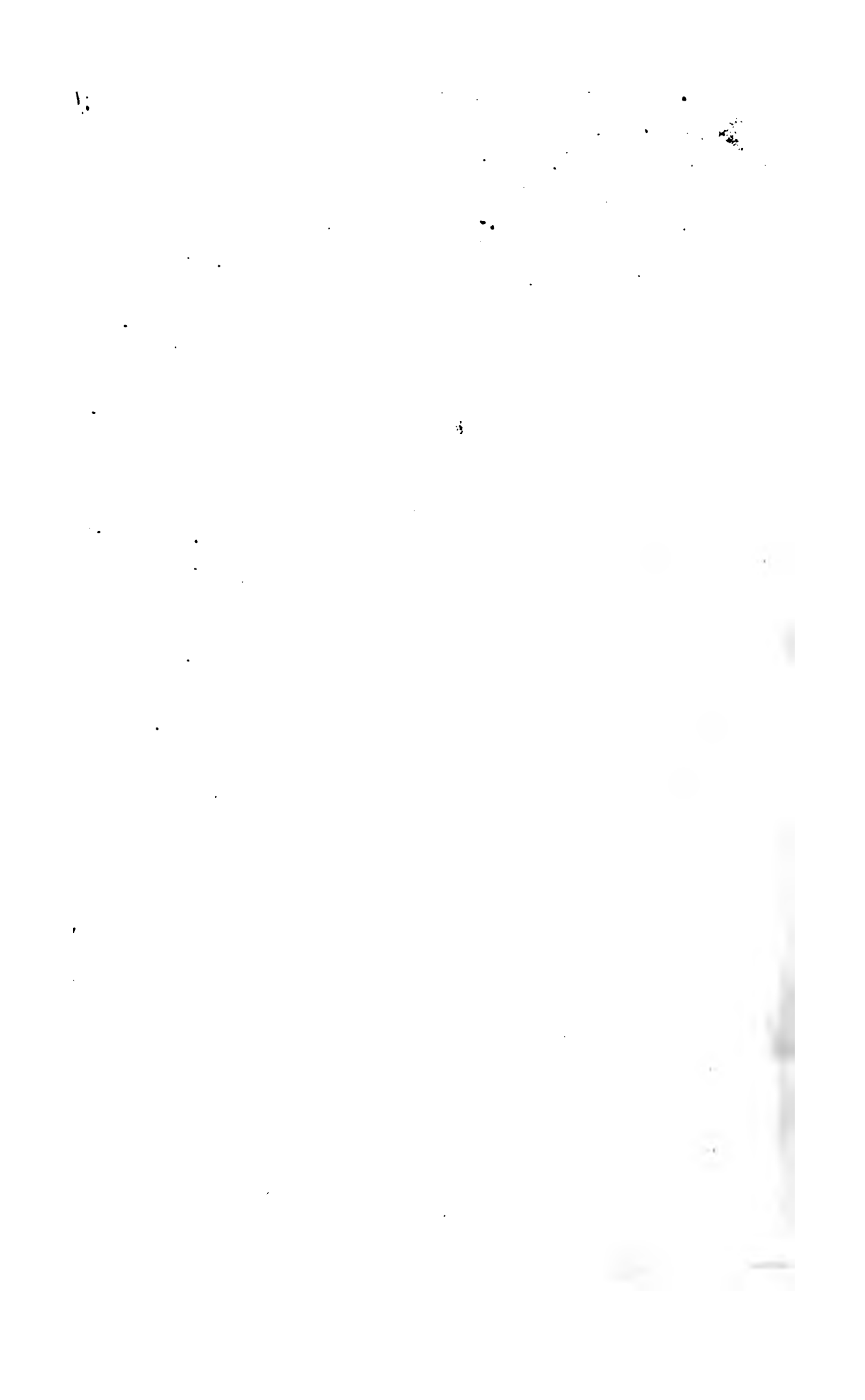
See EVIDENCE.

COSTS, 1.

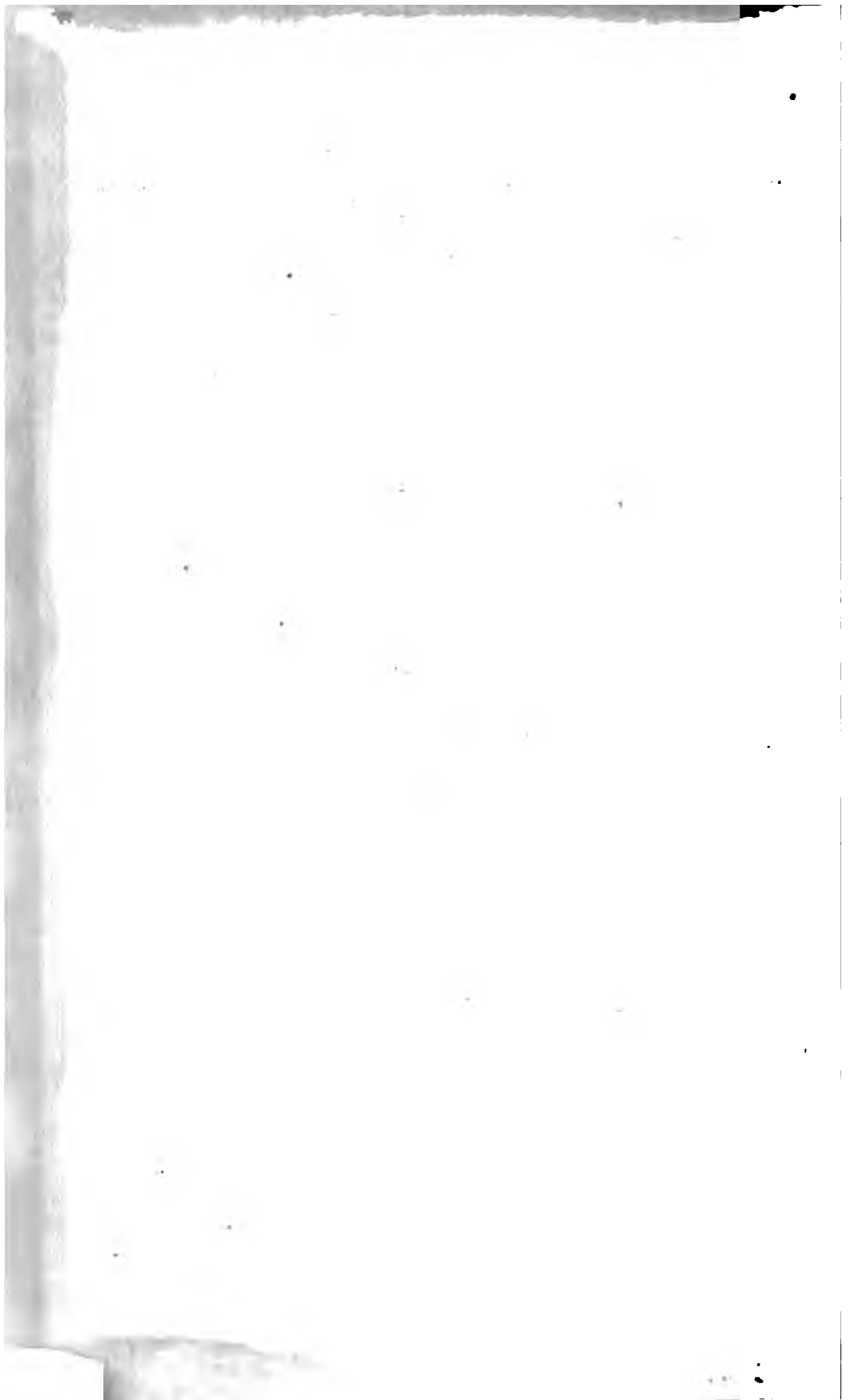
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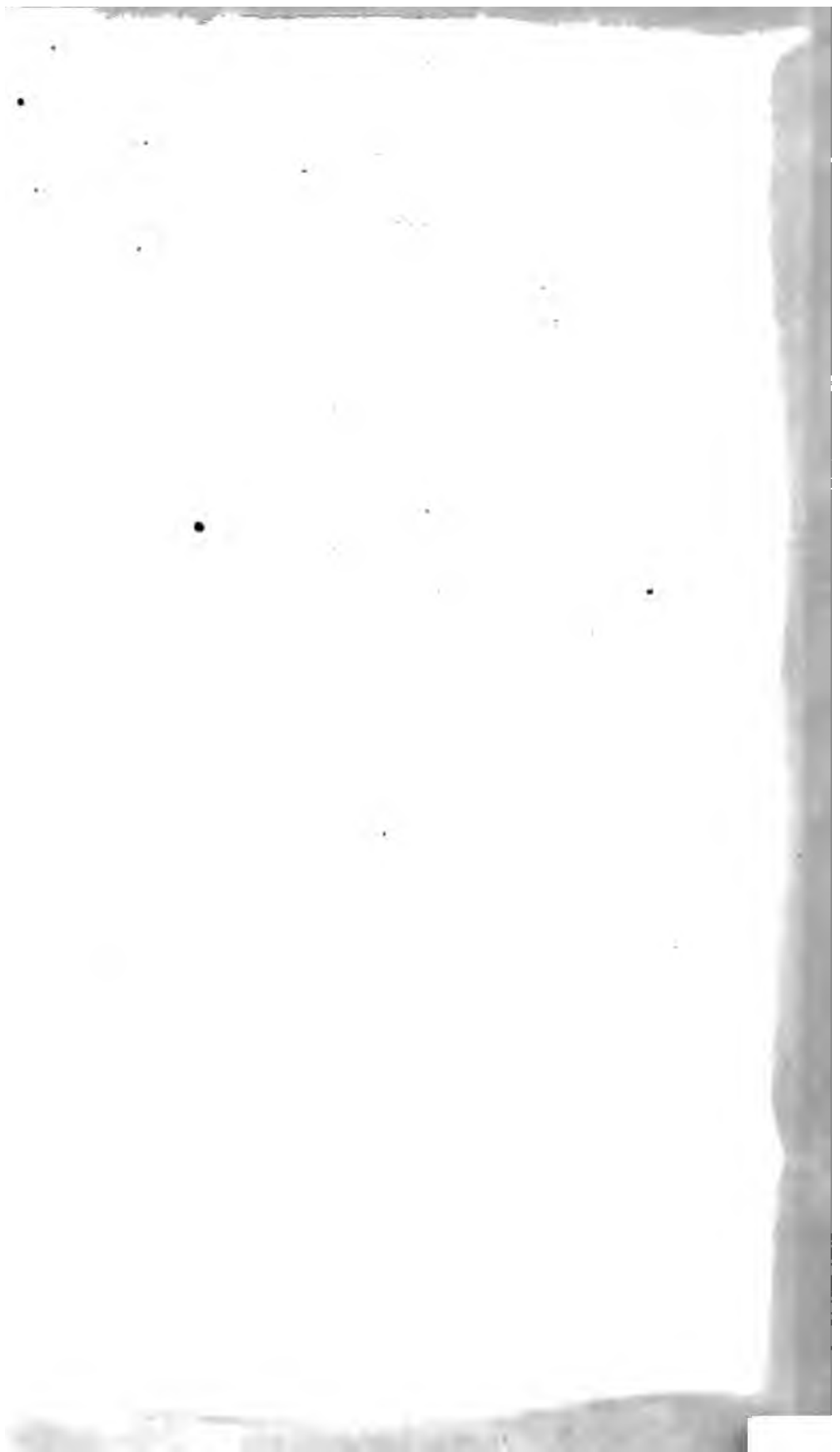
See AUCTION.

END OF THE SECOND VOLUME.









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